Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

vs.

AMERICAN AIRLINES, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND DISTRICT OF TEXAS, FORT WORTH

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Airline Deregulation Act of 1978, as amended, 49 U.S.C. § 41713(b)(1), preempts state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." In this case, Texas courts declined to preempt an airlines' business tort claims made against persons engaged in commerce with the airlines' frequent flyer miles. The questions presented are:

Whether 49 U.S.C. § 41713(b)(1) only preempts claims against certificated air carriers.

If preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim against a particular person is preempted.

Whether 49 U.S.C. § 41713(b)(1) preempts state business tort claims that act as a "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier."

PARTIES TO THE PROCEEDING

Petitioners are Frequent Flyer Depot, Inc., a Texas corporation, and George Pirkle and Robert Pirkle, the officers and shareholders of Frequent Flyer Depot, Inc.

Respondent American Airlines, Inc. is a wholly owned subsidiary of AMR Corp., a publicly traded company.

Other parties in the trial court are Luxury Travel Source, Mukesh Kuhmar Goyal, Main St. Travel Center of Monsey, Inc. and Ben Weber.

Rule 29.6 STATEMENT

Frequent Flyer Depot, Inc. has no parent corporation, nor does any corporation own more than 10% of the stock of Frequent Flyer Depot, Inc. and it is not a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle (jointly referred to as "Petitioners" or "Frequent Flyer") seek reversal of the temporary injunction entered by the 67th Judicial District Court, Tarrant County, Texas, in favor of American Airlines, Inc. ("American") on the ground that the business tort claims upon which the temporary injunction is based are preempted by 49 U.S.C. § 41713(b)(1).

OPINIONS OF LOWER COURTS

American sued Frequent Flyer on August 2, 2007, in 67th Judicial District Court, Tarrant County, Texas, Cause No. 067-224132-07. (Pet. App. 31A-52A). Frequent Flyer raised the affirmative defense that American's tort claims are preempted by 49 U.S.C. §41713(b). (Pet. App. 77A-79A).[1]

The trial judge preliminarily enjoined Frequent Flyer from brokering the sale and purchase of frequent flyer miles on September 19, 2008. (Pet. App. 28A-30A). Frequent Flyer appealed to the Texas Second Court of Appeals at Fort Worth, Texas, raising a number of issues, including preemption. Tex. Civ. Prac. & Rem. Code, § 51.014(a)(4). The Court of Appeals affirmed on February 26, 2009. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.* 281 S.W.3d 215 (Tex. App. – Fort Worth 2009, pet. denied). (Pet. App. 3A-27A).

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[1] Frequent Flyer counterclaimed for violations of the Texas antitrust statutes, among other things. (Pet. App. 53A-76A).

Frequent Flyer petitioned the Texas Supreme Court to review the lower court's holdings on March 25, 2009. Tex. Gov't Code § 22.001(a)(2). The petition was denied on August 21, 2009. (Pet. App. 2A). Petitioners' motion for rehearing was denied on October 9, 2009. The Texas Supreme Court did not issue an opinion. (Pet. App. 1A).

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257. Texas courts erred in applying governing federal law to Texas business tort law when granting and affirming the temporary injunction against the Petitioners. *Org. for a Better Austin v. Keefe,* 402 U.S. 415 (1971). Texas courts also erred in finding that American's claims against Petitioners were not preempted. *Mitchell v. Forsyth,* 472 U.S. 511, 525 (1985); *see also, Belknap Inc. v. Hale,* 496 U.S. 491, 497 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The lower courts' actions and this Petition involve the application of federal law to state business tort claims[2], U.S. Const. amend. XIV and provisions of the Airline Deregulation Act of 1978,

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[2] The issues presented in this Petition do not relate to personal injury torts which are the subject of separate jurisprudence. *See Taj Mahal Travel, Inc. v. Delta Air Lines,* 164 F.3d 186 (3rd Cir. 1998); *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259 (9th Cir. 1998); *Farash v. Cont'l Airlines,* Inc., 574 F.Supp. 356 (S.D. N.Y. 2008); *Atl. Coast Airbus v. Cook,* 857 N.E.2d 989 (Ind. 2006)

P.L. 95-504, as amended, 49 U.S.C. § 40101(a), 40101(f), 40102(a)(2), 40102(a)(45), 41712(a), and 41713(b)(1). The constitutional and statutory provisions follow.

U.S. Const. amend. XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 40101

> (a) Economic Regulation.— In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity:
>
> * * *
>
> (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices.

* * *

(6) placing maximum reliance on competitive market forces and on actual and potential competition—
(A) to provide the needed air transportation system; and
(B) to encourage efficient and well-managed air carriers to earn adequate profits and attract capital, considering any material differences between interstate air transportation and foreign air transportation.

* * *

(9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation.

(10) avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.

* * *

(f) Strengthening Competition.— In selecting an air carrier to provide foreign air transportation from among competing applicants, the Secretary of Transportation

shall consider, in addition to the matters specified in subsections (a) and (b) of this section, the strengthening of competition among air carriers operating in the United States to prevent unreasonable concentration in the air carrier industry.

49 U.S.C. § 40102(a)(2)

(2) "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

49 U.S.C. § 40102(a)(45)

(45) "ticket agent" means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

49 U.S.C. § 41712(a)

(a) In General.— On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice

> and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.
>
> 49 U.S.C. § 41713(b)(1)
>
> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

STATEMENT OF THE CASE

American is a major air carrier. American operates the AAdvantage frequent flyer program by which AAdvantage members obtain and use AAdvantage frequent flyer miles ("Miles"). AAdvantage members acquire Miles by flying on American and other airlines with whom American has "partner" agreements which enable AAdvantage members to earn and use Miles on those airlines, (Pet. App. 83A-87A), and from third persons to whom American sells Miles for distribution. (Pet. App. 34A-35A). AAdvantage members can use their Miles to purchase tickets from American and other airlines, and to purchase a variety of goods and services unrelated to American and air transportation. (Pet. App. 34A-35A; 82A-83A).

AMR Corp., American's parent corporation, reported with regard to American's AAdvantage program:

> American sells mileage credits and related services to other participants in the AAdvantage program. There are over 1,000 program participants, including leading credit card issuer, hotels, car rental companies and other products and services companies in the AAdvantage program. . . . Under its agreements with AAdvantage members and program participants, the Company reserves the right to change the AAdvantage program any time without notice, and may end the program with six months notice. As of December 31, 2007, AAdvantage had approximately 60 million total members, and 613 billion outstanding award miles. During 2007, AAdvantage issued approximately 200 billion miles, of which approximately one-half were sold to program participants.

AMR Corp. 2007 10-K filed with the Securities and Exchange Commission (Pet. App. 100A-101A).

The AAdvantage terms provide that (a) AAdvantage members do not own their Miles, (b) the accumulation of Miles does not entitle AAdvantage members to any vested rights, (c) AAdvantage members may not rely upon the continued availability of any award or award level, (d) American can change the AAdvantage terms at any time, and (e) the sale or barter of Miles is prohibited. (Pet. App. 92A-99A). American claims that the AAdvantage terms constitute a contract. Petitioners

contest that assertion. American's claims relate to its prohibition against the sale or barter of Miles.

Frequent Flyer competes with American by brokering the sale and purchase of frequent flyer miles issued by American and other airlines. (Pet. App. 44A; 88A-91A). Tickets to fly on American can be purchased with brokered Miles at a cost less than tickets purchased directly from American. (Pet. App. 39A; 80A-81A). Among other things, Frequent Flyer makes reservations and arranges the purchase of airline tickets for its customers. (Pet. App. 81A-82A; 88A-91A).

American alleges that Petitioners wrongfully assisted AAdvantage members to sell their Miles. American seeks to recover damages and to obtain temporary and permanent injunctive relief to prevent Frequent Flyer from brokering the sale of Miles. American alleges that Frequent Flyer committed the Texas torts of (a) tortious interference with contract, (b) tortious interference with prospective business relations, (c) misappropriation of award tickets, and (d) fraud in obtaining award tickets.[3] (Pet. App. 40A-49A). The trial court preliminarily enjoined Frequent Flyer from brokering the sale and purchase of Miles. (Pet. App. 28A-30A).

REASONS FOR GRANTING THE PETITION

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[3] American sued Robert Pirkle for alleged breach of contract by acquiring Miles for his personal use. The contract claim did not form a basis for the claim for injunctive relief.

This case involves the application of 49 U.S.C. § 41713(b)(1) to business tort claims made against persons involved with air transportation who are not certificated air carriers. 14 C.F.R. § 380.2. The 49 U.S.C. § 41713(b)(1) preemption is part of the Airline Deregulation Act of 1978, P.L. 95-504, as amended, and preempts state "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier." The Texas courts answered important questions of federal law related to the scope of the 49 U.S.C. § 41713(b)(1) preemption that have not been settled by this Court. The Texas courts' answers conflict with the Constitution, with decisions of this Court and with decisions of lower federal courts. This case involves a "closer working out" of the scope of the 49 U.S.C. § 41713(b)(1) preemption. *Am. Airlines v. Wolens,* 513 U.S. 219, 234-5 (1995).

Claims under state consumer protection statutes made against certificated air carriers related to their frequent flyer programs are preempted by 49 U.S.C. § 41713(b)(1). *Id.* at 222. Not yet resolved by this Court are whether the preemption applies equally to persons who are not certificated air carriers, 14 C.F.R. § 380.2, and whether 49 U.S.C. § 41713(b)(1) preempts common law business tort claims.

The reasons to grant the Petition are to resolve (a) whether 49 U.S.C. § 41713(b)(1) preempts claims involving air transportation against persons who are not certificated air carriers, (b) if the preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim

against a particular person is preempted, and, (c) whether 49 U.S.C. § 41713(b)(1) preempts common law business torts that act as a "law, regulation or other provision having the effect of law related to a price, route, or service of an air carrier."

Statutory Construction

49 U.S.C. § 41713(b)(1) unequivocally and plainly provides that no state shall impose any law related to the prices, routes or services of an air carrier. An "'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2). Nothing in 49 U.S.C. § 41713(b)(1) limits the preemption to identifiable "beneficiaries" of the statute or only to "official" regulations and law.[4]

Resolution of the issues presented depends upon the proper construction of 49 U.S.C. § 41713(b)(1) through reference to Congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-6 (1996). The strong presumption is that Congressional intent is expressed in the plain language of the statute. Congressional intent is only overcome in "rare and exceptional circumstances." *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. ____, 128 S.Ct. 1511, 1518, 170 L.Ed.2d 392, 401 (2008); *also Ardestani v. INS*, 502 U.S. 129, 135 (1991); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

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[4] This Court permitted the enforcement of self imposed obligations in *Wolens*, 513 U.S. at 229, and the courts' treatment of personal injury torts has been distinct from statutory and business tort law.

Congress evidenced a strong intent that the 49 U.S.C. § 41713(b)(1), as part of the Airline Deregulation Act of 1978, be construed broadly to support competition. As noted in its consideration of the predecessor to 49 U.S.C. § 41713(b)(1), the Court concluded that Congress, in 1978, "determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices,' as well as 'variety [and] quality of air transportation services,' enacted the Airline Deregulation Act." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-9 (1992).

Congress provided that in carrying out its economic regulation of the aviation industry, 49 U.S.C. §§ 41101-42121, the Secretary of Transportation "shall consider the following matters, among others, as being in the public interest:" "adequate, economic, efficient, and low-priced services without unreasonable discrimination, or unfair trade practices," 49 U.S.C. § 40101(a)(4) "placing maximum reliance on competitive market forces and on actual or potential competition," 49 U.S.C. § 40101(a)(6) "preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation," 49 U.S.C. § 40101(a)(9) and "strengthening competition." 49 U.S.C. § 40101(f). The Texas courts eliminated Frequent Flyer's competition with American.

The Texas courts enforced state law "related to" American's prices, routes and services by enforcing AAdvantage terms against strangers to the purported contracts between American and AAdvantage members by holding the Petitioners

responsible in tort for breaches of American's claimed contract by AAdvantage members. The Texas courts eliminated Frequent Flyer Depot as a competitor. The effect is that AAdvantage terms have the force of law.

Courts broadly read the 49 U.S.C. § 41713(b)(1) preemption. *Morales,* 504 U.S. at 383-4, *also Rowe v. N.H. Motor Transp. Assoc.*, 552 U.S. 364 (2008); *Wolens,* 513 U.S. 219. In *Morales,* 504 U.S. at 384 the Court held:

> True to our word, we have held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, 'if it has a connection with or reference to such a plan." *Shaw, supra,* at 97. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: *State enforcement actions having a connection with, or reference to, airline "rates, routes, or services" are pre-empted* under 49 U. S. C. App. § 1305(a)(1) [now 49 U.S.C. § 41713(b)(1)].

(Emphasis added). In *Wolens,* the Court found that the preemption encompassed statutory claims related to American's frequent flyer miles.[5] 513 U.S. at 227.

The Texas courts narrowly read 49 U.S.C. § 41713(b)(1) to avoid preemption of common law business tort claims made against persons who are

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[5] In this case, the contractual claim against Robert Pirkle for a flight to Las Vegas did not provide a basis for the granted injunctive relief.

not certificated air carriers related to frequent flyer miles.

Federal Courts Preempt Claims Against Persons Who Are Not Certificated Air Carriers

Federal courts have read 49 U.S.C. § 41713(b)(1) to preempt actions against certificated and direct air carriers and against persons who are not direct or certificated air carriers. 49 U.S.C. § 41713(b)(1) preempts statutorily based claims raised against a certificated air carrier by consumers related to the air carrier's frequent flyer program. *Wolens*, 513 U.S. 219. In *Morales*, the Court preempted state attorney general guidelines for the application of state consumer protection laws to airline fares and frequent flyer miles. Although the guidelines directly related to airlines, the guidelines related to the practices of others selling airline tickets, such as ticket agents. The Court made no distinction between airlines and others to whom the guidelines might. Lower federal courts have held that 49 U.S.C. § 41713(b)(1) preempts claims against (a) travel agencies and charter companies providing services to individuals traveling to Cuba or who wish to send humanitarian aid or family remittances to Cuba, *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1288 (S.D. Fla. 2009); (b) a company providing a computer reservation system to an air carrier, *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 (5th Cir.), *cert. denied* 537 U.S. 1044 (2002) ("ADA preemption is not limited to claims brought directly against air carriers. Rather, claims are preempted if they 'relate to' the prices, routes or services of an air carrier." citations omitted); (c) the trucking operations of an air carrier,

Fed. Express Corp. v. Cal. Pub. Util. Comm'n, 936 F.2d 1075 (9th Cir. 1991), *cert. denied* 504 U.S. 979 (1992); (d) a company providing pre-departure clearance of passengers, *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs,* 906 F. Supp. 357 (M.D. La. 1995); and (e) the operator of a "jetbridge," *Marlow v. AMR Serv. Corp.,* 870 F. Supp. 295 (D. Haw. 1994). 49 U.S.C. § 41713(b)(1) has been held to preempt claims against an air carrier's parent, *Cont'l Airlines, Inc. v. Am. Airlines,* 824 F. Supp. 689 (S.D. Tex. 1993), and claims made by air carriers against other air carriers. *See Mesa Airlines, Inc. v. Delta Air Lines, Inc.*, 219 F.3d 605 (7th Cir.), *cert. denied* 531 U.S. 1036 (2000); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 120 F. Supp.2d 556 (E.D. Va. 2000); *Cont'l Airlines, Inc. v. Am. Airlines,* 824 F. Supp. at 689.

The questions presented are (a) whether 49 U.S.C. § 41713(b)(1) is limited by consideration of against whom the claim is made and, if so, (b) what criteria are to be used to distinguish between persons against whom claims are preempted and persons against whom claims are not preempted.

Federal Courts Preempt Non-statutory State Law Tort Claims

Lower federal courts have found that 49 U.S.C. § 41713(b)(1) preempts business tort claims. *Mesa Airlines,* 219 F.3d. at 605 (tortious interference with contractual relations, breach of fiduciary relations and fraudulent inducement); *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 120 F. Supp.2d at 556 (tortious interference with contractual relations and with prospective economic advantage);

Lyn-Lea Travel Corp., 283 F.3d at 282 (tortious interference with business relationships, fraud, and violations of the Texas Deceptive Trade Practices Act); *Cont'l Airlines, Inc. v. Am. Airlines*, 824 F. Supp. at 689 (tortious interference with business relations and unfair competition).

The question presented is whether 49 U.S.C. § 41713(b)(1) preempts business tort claims which relate to the "prices, routes and services" of an air carrier.

Frequent Flyer Depot Subject to 49 U.S.C. § 41713(b)(1)

Assuming that the provisions of 49 U.S.C. § 41713(b)(1) are not to be read to preempt claims against any person "related in anyway to the price, route, or service of an air carrier," distinctions must be made that warrant the application and non-application of 49 U.S.C. § 41713(b)(1) to state law claims made against particular persons. The Transportation Department's regulations make distinctions among types of air carriers and define "certificate air carriers," "direct air carriers," "foreign air carriers," and "indirect air carriers." 14 C.F.R. § 380.2. With persons such as Frequent Flyer Depot and similar service providers, another pertinent distinction between persons against whom state law claims are and are not preempted might be whether the person is subject to regulation under 49 U.S.C. § 41712(a), which gives the Secretary of Transportation authority over the conduct of air carriers, foreign air carriers and ticket agents.

Lower federal court have concluded that the term "air carrier" is not limited to certificated air carriers. *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.; Monarch Travel Servs. v. Assoc'd. Cultural Clubs*, 466 F.2d 552 (9th Cir. 1972) *cert. denied*, 410 U.S. 967 (1973); *Huntleigh Corp. v. La. State Bd. of Private Sec. Exam'rs*; *Marlow v. AMR Serv. Corp.*; *ABC Charters, Inc. v. Bronson*, 591 F.Supp 2d at 1299; *Arkin v. Trans Int'l, Inc.*, 568 F. Supp. 11, 13 (E.D.N.Y. 1982); *Ill. Corporate Travel, Inc. v. Am. Airlines, Inc.*, 682 F. Supp. 378, 380 (N.D. Ill. 1998) 49 U.S.C. § 40102(a)(45), defining ticket agents, demonstrates Congressional recognition that air transportation involves more than just the air carriers. Frequent Flyer Depot provides services related to obtaining tickets for travelers as does a company providing computer reservation and each can be deemed to be "air carrier" under 49 U.S.C. § 40102(a)(2) or "ticket agent" under 49 U.S.C. § 40102(a)(45). *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*[6]

In *Morales* and *Wolens*, the Court considered 49 U.S.C. § 41713(b)(1) in conjunction with the Transportation Secretary's 49 U.S.C. § 41712(a) authority over "an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." The relationship between 49 U.S.C. § 41713(b)(1) and 49 U.S.C. § 41712(a) is manifest. Laws and regulations related

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[6] The distinction between ticket agents and air carriers is mutually exclusive, 49 U.S.C. § 40102(a)(45), but no case authority seems to have addressed the distinction. Perhaps the lack of distinction arises from the fact that, in the context of either finding, the result would be the same with regard to the 49 U.S.C. § 41713(b)(1) preemption.

to an air carrier's prices, routes or services perforce relate to the way an air carrier competes with other carriers and its practices towards its customers. *Morales*, 504 U.S. at 378-9; *Wolens*, 513 U.S. at 222.

The possible distinction based on 49 U.S.C. § 41712(a) does not preclude preemption of American's claims made against Frequent Flyer as 49 U.S.C. § 41712(a) applies both to Frequent Flyer and American. American alleges that Frequent Flyer assisted AAdvantage members to violate the AAdvantage terms. (Pet. App. 36A-40A). American alleges that Frequent Flyer unfairly competed with American by engaging in commerce with Miles and engaged in unfair and deceptive trade practices against AAdvantage members by brokering the purchase and sale of Miles.[7] (Pet. App. 36A-52A).

By brokering Miles, making reservations and purchasing airline tickets with Miles, Frequent Flyer Depot, Inc. and the Pirkles are either an "indirect air carriers" or a "ticket agents" who "sell, offer for sale, negotiate for, or hold [themselves] out as selling, providing, or arranging for, air transportation." (Pet. App. 81A-82A). In either event, both 49 U.S.C. § 41712(a) and 49 U.S.C. § 41713(b)(1) apply to their activities.

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[7] American Airlines does not have standing to complain of alleged wrongs committed against AAdvantage members. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.")

The Texas Court of Appeals' Reasoning

The Texas Court of Appeals held that, because American seeks to enforce restrictions it imposes on AAdvantage members, enforcing those restrictions against third persons through recourse to business tort law does not constitute imposition of state law on the prices, routes or services of an air carrier. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d at 221-2. Citing *Wolens*, the Texas Court of Appeals concluded that, since obligations assumed by American can be enforced, obligations imposed by American on AAdvantage members can be enforced against third persons who have no privity of contract with American. *Id.* Frequent Flyer voluntarily assumed no obligations to American. American seeks to impose obligations on Frequent Flyer. The distinctions between *Wolens* and this case are that Frequent Flyer Depot assumed no obligations and the preempted obligations in *Wolens* were in a statute and in this case the obligations are created and enforced by common law. The lower court's analysis simply provides no basis for concluding that, since American's assumed obligations are not preempted, the obligations American seeks to impose on third persons similarly are not preempted.

Equal Protection in Application of Preemption Statute

American and Frequent Flyer Depot are both subject to the provisions of Air Deregulation of 1978, as amended; thus, statutes, case law and analysis which preempt claims against air carriers should apply equally to American's claims against Petitioners. U.S. Const. amend. XIV; *Lawrence v.*

Texas, 539 U.S. 558, 579 (2003); *Lehr v. Robertson*, 463 U.S. 248, 265 (1983):

> The concept of equal justice under law requires the State to govern impartially. *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Any distinctions that might be drawn between American and the Petitioners under the Airline Deregulation Act of 1978 are irrelevant.

CONCLUSION

Neither the clear language of the statute nor case authority support the conclusion that 49 U.S.C. § 41713(b)(1) preempts claims against American Airlines but does not preempt claims against Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle. That result would create distinctions between air carriers and others that would change 49 U.S.C. § 41713(b)(1) into an airline protection statute rather than part of Congress' statutory scheme to advance competition in air transportation. Failure to preempt common law as well as statutory law under 49 U.S.C. § 41713(b)(1) would create a distinction that would strip the 49 U.S.C. § 41713(b)(1) preemption of meaning and exalt form over substance.

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that the Court reverse the lower

courts' judgments on the ground that 49 U.S.C. § 41713(b)(1) preempts American's claims against the Petitioners and direct the entry of orders and judgments in accordance with this Court's ruling.

Respectfully submitted,

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TEXAS SUPREME COURT

NO. 09-0240

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE AND ROBERT PIRKLE

APPELLANTS

V.

AMERICAN AIRLINES, INC.

APPELLEE

FROM THE 2ND DISTRICT COURT OF APPEALS
AND THE 67TH DISTRICT COURT OF TARRANT
COUNTY

OCTOBER 9, 2009

PETITION FOR REHEARING DENIED

TEXAS SUPREME COURT

NO. 09-0240
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AND THE 67TH DISTRICT COURT OF TARRANT
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AUGUST 21, 2009

PETITION FOR REVIEW DENIED

COURT OF APPEALS

SECOND DISTRICT OF TEXAS

FORT WORTH

NO. 2-08-386-CV

FREQUENT FLYER DEPOT, INC.,
APPELLANTS
GEORGE PIRKLE, AND ROBERT PIRKLE

V.

AMERICAN AIRLINES, INC.
APPELLEE

FROM THE 67TH DISTRICT COURT OF
TARRANT COUNTY

OPINION

This is an accelerated interlocutory appeal from the imposition of a temporary injunction prohibiting appellants Frequent Flyer Depot, Inc. and its officers and owners, George and Robert Pirkle, from engaging in the brokering, purchase, sale, bartering, and solicitation of American Airlines AAdvantage® rewards points. Appellants challenge the injunction on seven grounds: the underlying suit is pre-empted

by federal law; the injunction does not preserve the status quo; there is no enforceable contract between American and its AAdvantage® members prohibiting members from selling their rewards points to third parties; the hearing on the temporary injunction should have been continued for appellants to obtain discovery on their antitrust-related counterclaims; American failed to show an imminent injury; American has an adequate remedy; and principles of equity bar the imposition of an injunction. Because we conclude that there is no reversible error on any of these grounds, we affirm.

Background

Frequent Flyer admittedly brokers the purchase and sale of airline frequent flyer miles and awards, including AAdvantage® rewards points issued by American to its AAdvantage® members. The Pirkles are officers and owners of Frequent Flyer. American sued appellants and other similar brokers and their principals, contending that the brokering, purchase, bartering, and sale of AAdvantage® rewards is improper. Among its claims against appellants are claims for tortious interference with contract, tortious interference with prospective relations, misappropriation, and fraud. American also asserted a breach of contract claim against Robert Pirkle. After filing suit, American sought and obtained a temporary injunction prohibiting appellants from buying, selling, bartering, or soliciting AAdvantage® rewards during pendency of the suit.

Standard of Review

To be entitled to a temporary injunction, the applicant must plead a cause of action and further show both a probable right to recover on that cause of action and a probable, imminent, and irreparable injury in the interim. Butnaru v. Ford Motor Co., 84 S.W.3d 198, 204 (Tex. 2002); Argyle ISD ex rel. Bd. of Trustees v. Wolf, 234 S.W.3d 229, 236 (Tex. App. -- Fort Worth 2007, no pet.); Fox v. Tropical Warehouses, Inc., 121 S.W.3d 853, 857 (Tex. App. -- Fort Worth 2003, no pet.). A probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it. Wolf, 234 S.W.3d at 236; Fox, 121 S.W.3d at 857. An injury is irreparable if damages would not adequately compensate the injured party or if they cannot be measured by any certain pecuniary standard. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 236; Fox, 121 S.W.3d at 857.

In an appeal from an order granting or denying a temporary injunction, the scope of review is restricted to the validity of the order granting or denying relief. Walling v. Metcalfe, 863 S.W.2d 56, 58 (Tex. 1993); Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. Whether to grant or deny a request for a temporary injunction is within the trial court's discretion, and we will not reverse its decision absent an abuse of discretion. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. Accordingly, when reviewing such a decision, we must view the evidence in the light most favorable to the trial court=s order, indulging every reasonable inference in its favor, and determine whether the order was so arbitrary that it exceeds the bounds of reasonable discretion. Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. A trial court does not abuse its

discretion if it bases its decision on conflicting evidence and at least some evidence in the record reasonably supports the trial court's decision. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978); Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. When findings of fact are not requested or separately filed, as in this case, we must uphold the trial court's order on any legal theory supported by the record. Mabrey v. SandStream, Inc., 124 S.W.3d 302, 309 (Tex. App. -- Fort Worth 2003, no pet.).

Pre-emption Claim

Appellants first contend that American's noncontract claims against them are pre-empted by the Airline Deregulation Act of 1978 (ADA), which provides, in part, that "[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C.A. 41713(b)(1) (West 2007). The United States Supreme Court has held that threatened enforcement by state attorneys general of "fare advertising guidelines" was pre-empted by the ADA. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 391, 112 S. Ct. 2031, 2041 (1992). The Court has also held that claims brought by AAdvantage® members against American in state court alleging violations of Illinois's Consumer Fraud Act were pre-empted by section 41713(b)(1). Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 226, 115 S. Ct. 817, 823B24 (1995).

Appellants allege that this suit likewise involves an attempt to regulate prices, routes, or services that is pre-empted by the Act. American counters that any suit brought against it attempting to apply standards to its AAdvantage® program would be pre-empted as an attempt to place state regulations upon prices, routes, or services but that any attempt by it to enforce via state law its own standards as to prices, routes, or services, including frequent flyer mile credits, is not pre-empted as impermissible state regulation. We agree with American.

In Morales, the Court considered the effect the advertising restrictions would have on airlines' fares, holding that the restrictions would curtail the airlines' ability to communicate their fares to customers. Morales, 504 U.S. at 389, 112 S. Ct. at 2039B40. But it also held that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect." Id. at 391, 112 S. Ct. at 2040.

The Court further distinguished contract actions in Wolens, holding that the Act does not shelter airlines from suits "seeking recovery solely for the airlines' alleged breach of its own self-imposed undertakings." Wolens, 513 U.S. at 228, 115 S. Ct. at 824. Although concluding that the Act pre-empted AAdvantage® members' Illinois Consumer Fraud Act claims because mileage credits are akin to "rates," the Court nevertheless held that as to contracts affecting such mileage credits, "[m]arket efficiency requires effective means to enforce private agreements." Id. at 230, 115 S. Ct. at 824.

After Morales and Wolens, courts have held that certain personal injury causes of actions against airlines are not pre-empted by the Act. See, e.g., Hodges v. Delta Airlines, Inc., 44 F.3d 334, 340 (5th Cir. 1995); Continental Airlines v. Kiefer, 920 S.W.2d 274, 283 (Tex. 1996). In explaining its decision in Kiefer, the Texas supreme court noted that, "as Wolens explains at some length, claims are not [pre-empted] if they do not involve the enforcement of policy-laden state law that too closely approaches a regulatory effect on airlines." Kiefer, 920 S.W.2d at 283.

Here, although American has brought mostly tort claims, those claims attempt to protect the vitality of its self-imposed obligations: those arising from the AAdvantage® program. American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts. See id. ("[T]he purpose of ADA preemption is not to absolve airlines from all liability under state law, but to prohibit state regulation of air carriers, direct or indirect. Congress' concern was 'that the States would not undo federal deregulation with regulation of their own.'"); see also Hodges, 44 F.3d at 337 ("Following deregulation, the CAB's [the former Civil Aeronautics Board's] statements implementing the ADA strongly support the view that the ADA was

concerned solely with economic deregulation, not with displacing state tort law."). Indeed, denying American access to state courts for such purposes would seem to have such an impermissible regulatory effect.

Appellants contend that it is unfair to allow the airlines unfettered access to the state courts to enforce their own standards related to frequent flyer programs while denying access to the state courts to the states themselves and other parties attempting to impose standards on the airlines under state law. But the fairness of this application is not for us to decide; we must abide by Congress's intentions when determining whether a suit is pre-empted by the Act. See Morales, 504 U.S. at 383, 112 S. Ct. at 2036 (noting that in determining whether a suit is pre-empted under the Act, the question is one of statutory intent, and we must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose").

We conclude and hold that American's suit against appellants is not pre-empted by section 41713 of the Act. We overrule appellants' first issue.

Status Quo

In their second issue, appellants contend that the injunction fails to preserve the status quo. According to appellants, they have been operating their business since 2002; they allege that American has known about their activities since that time, or at least since the beginning of the lawsuit. Appellants claim that because American knowingly allowed

their activities to continue for some time, the last peaceable uncontested status is to allow appellants to continue their business.

The purpose of a temporary injunction is to preserve the status quo until a trial on the merits. Butnaru, 84 S.W.3d at 204; Wolf, 234 S.W.3d at 237; Fox, 121 S.W.3d at 857. "Status quo is defined as 'the last, actual, peaceable, noncontested status which preceded the pending controversy.'" Universal Health Servs., Inc. v. Thompson, 24 S.W.3d 570, 577 (Tex. App. -- Austin 2000, no pet.) (quoting Transp. Co. v. Robertson Transps., Inc., 152 Tex. 551, 261 S.W.2d 549, 553B54 (1953)); see Wolf, 234 S.W.3d at 237.

George Pirkle testified at the temporary injunction hearing that an attorney for American called him "several times" in 2002 about domain names connected to Frequent Flyer's website, frequentflyerdepot.com. The attorney told George that those domain names constituted trademark infringement and that American wanted them back. George told the attorney that the domain names were connected to frequentflyerdepot.com, and he agreed to give them to American. Although George testified that the attorney did not tell him to stop operating frequentflyerdepot.com, he also admitted that he could not recall whether they had talked about Frequent Flyer's brokerage business. He also said that the lawyer never told him that American would permit Frequent Flyer to sell AAdvantage® miles.

Since 2005, American has stopped travel on tickets sold by Frequent Flyer by freezing the accounts of

AAdvantage® members who American discovers have improperly sold their rewards points to a third party. But George Pirkle admitted that American successfully discovers and stops travel on Frequent Flyer's transactions only between about three and four to ten percent of the time. American's representative testified that these "policing" efforts are disruptive, causing operational difficulties for American and diverting resources away from legitimate ticketing.

When American deposed George Pirkle as the designated representative of Frequent Flyer,[1] he admitted that Frequent Flyer "brokers" AAdvantage® rewards points; in other words, Frequent Flyer buys rewards points from AAdvantage® members and sells those points to third parties. He agreed that American had asked Frequent Flyer to stop doing so "earlier this year [2008]," and he confirmed that Frequent Flyer had refused. American sought the temporary injunction hearing shortly after taking appellants' depositions.

If, as American claims, appellants' activities are in violation of its agreements with AAdvantage® members, [2] the last peaceable, noncontested status is for appellants to refrain from selling AAdvantage® rewards points. There is no evidence that American knew of Frequent Flyer's brokering activities in 2002 when its attorney contacted George Pirkle about the domain names; as George himself testified, he bought around 136 domain names when he started. Likewise, there is no evidence that American knew in 2005 and later that the AAdvantage® accounts it was freezing for the improper sale of rewards points were sold through Frequent Flyer in particular.[3] Even so, it is a reasonable inference that American

could not have known the full extent of Frequent Flyer's activities, considering George's testimony that Frequent Flyer transactions were "caught" only between three to ten percent of the time.
American moved for a temporary injunction when it learned the full extent of Frequent Flyer's activities and Frequent Flyer refused to discontinue those activities even in the face of American's suit.
American should not be denied its ability to obtain injunctive relief to which it is otherwise entitled simply because it took some time for it to discover Frequent Flyer's admittedly concealed activity. See Sharma v. Vinmar Int'l, Ltd., 231 S.W.3d 405, 428B29 (Tex. App. -- Houston [14th Dist.] 2007, no pet.) (holding that complete preservation of status quo in case involving improper use of trade secrets to operate competing chemical sales company was that new company would not be able to sell any of the disputed chemicals). We hold that the trial court's injunction properly preserves the status quo pending resolution of the suit. Accordingly, we overrule appellants' second issue.

Enforceability of Agreement Between American and AAdvantage® Members

Appellants contend in their third issue that there is no evidence that American has a binding contract with its AAdvantage® members such that appellants' actions in buying and selling, and inducing AAdvantage® members to buy and sell, AAdvantage® rewards points are improper as alleged by American in its tort claims.
To become an AAdvantage® member, a person must agree to American's online User Agreement, which contains the following provision: "At no time may

AAdvantage® mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration." The User Agreement also contains other provisions allowing American to change the terms of the AAdvantage® program, upon which appellants base their claim that the User Agreement lacks mutuality and is, therefore, unenforceable. Specifically, the User Agreement states that American may, in its discretion, change the AAdvantage® program rules, regulations, travel awards, and special offers at any time with or without notice. . . . American Airlines may make one or more of [certain enumerated] changes at any time even though such changes may affect your ability to use the mileage credit or awards that you have already accumulated. American Airlines reserves the right to end the AAdvantage® program with six months notice.[4]

According to appellants, this clause shows a fatal lack of mutuality, rendering the entire agreement unenforceable.

A bilateral contract is one in which there are mutual promises between two parties to the contract, each being both a promisor and a promisee. Hutchings v. Slemons, 141 Tex. 448, 174 S.W.2d 487, 489 (1943); The Colony, Tex. v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 725 (Tex. App. -- Fort Worth, no pet. h.). A bilateral contract must be based upon a valid consideration, in other words, mutuality of obligation. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 409 (Tex. 1997); The Colony, 272 S.W.3d at 725. Consideration may consist of either benefits or detriments to the contracting parties; it may consist

of some right, interest, profit, or benefit that accrues to one party, or alternatively, of some forbearance, loss, or responsibility that is undertaken or incurred by the other party. The Colony, 272 S.W.3d at 725; In re C & H News Co., 133 S.W.3d 642, 647 (Tex. App. -- Corpus Christi 2003, orig. proceeding). The existence of a written contract presumes consideration for its execution. The Colony, 272 S.W.3d at 725; Doncaster v. Hernaiz, 161 S.W.3d 594, 603 (Tex. App. -- San Antonio 2005, no pet.). A contract that lacks mutuality of obligation is illusory and void and thus unenforceable. The Colony, 272 S.W.3d at 725; Tex. S. Univ. v. State St. Bank & Trust Co., 212 S.W.3d 893, 914 (Tex. App. -- Houston [1st Dist.] 2007, pet. denied). A promise is illusory when it fails to bind the promisor who retains the option of discontinuing performance without notice. Light v. Centel Cellular Co. of Tex., 883 S.W.2d 642, 645 (Tex. 1994); The Colony, 272 S.W.3d at 725; Rogers v. Alexander, 244 S.W.3d 370, 382 (Tex. App. -- Dallas 2007, no pet. h.). But mutuality in each clause of a contract is not required when consideration is given for the contract as a whole. Howell v. Murray Mortgage Co., 890 S.W.2d 78, 87 (Tex. App. -- Amarillo 1994, writ denied).

The test for mutuality is applied and determined when enforcement is sought, not when the promises are made. Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, Inc. v. Skinny's, Inc., 893 S.W.2d 313, 316 (Tex. App. -- Eastland 1994, writ denied). Accordingly, even if an illusory promise renders a contract unilateral, consideration can still be established by part performance by the promisee. Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316; cf. Alex Sheshunoff Mgmt. Servs.,

L.P. v. Johnson, 209 S.W.3d 644, 650-51 (Tex. 2006) (distinguishing general rule as to covenants not to compete, which, by statute, must be enforceable when entered into).

Here, the clause pointed to by appellants allows American to terminate the program upon notice and allows American to change the terms of the program with or without notice. However, that does not mean American is without obligation to its members under the User Agreements. In consideration for AAdvantage® members' purchasing paid travel on American and its partner airlines, and purchasing other services from specified providers, American agrees to provide rewards points to those customers. It is nonsensical for appellants to argue that no enforceable agreement exists when their entire business depends on the enforceability of that agreement. In other words, if American has no obligation to issue a ticket in exchange for rewards points when an AAdvantage® member fully complies with the User Agreement, appellants are ill-positioned to complain about the trial court's enjoining their activities, which depend on American's complying with its obligation even when a ticket is obtained in violation of the applicable User Agreement. Appellants cannot have it both ways. Additionally, as appellants point out in their brief, American's misappropriation claim "as alleged requires a showing that [appellants] 'wrongfully[]obtained award tickets.'" The key word here is "obtained," in the past tense. It is undisputed that American has issued tickets in exchange for rewards points purchased through Frequent Flyer. With regard to those tickets, then, American has performed under the applicable User Agreements.

Thus, even if American's consideration was illusory when it entered into the applicable User Agreements, its subsequent performance under those agreements established consideration, rendering those agreements enforceable. See Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316.

The same holds true for tickets that American will issue in exchange for rewards points in the future. If American does not issue any such tickets, then the question of whether American can enforce the no-sale rule is moot. But if American does issue tickets in exchange for rewards points acquired through purchase or barter-then it will again have partially performed under the User Agreements at issue, thus establishing the necessary consideration to render those agreements enforceable. See Hutchings, 174 S.W.2d at 489; Cherokee Commc'ns, 893 S.W.2d at 316.[5]

For these reasons, we conclude and hold that American's AAdvantage® User Agreements do not fail for lack of mutuality, and we overrule appellants' third issue.

Continuance

In their fourth issue, appellants claim that the trial court abused its discretion by refusing to continue the temporary injunction hearing.

Appellants moved for a continuance both before and after the temporary injunction hearing on the ground that American had refused to produce documents in response to appellants' Third Request for Production. Appellants requested these documents in conjunction

with their counterclaims against American for interference with contractual and business relations, tortious interference with prospective relations, a declaratory judgment that appellants' actions in purchasing and selling AAdvantage® rewards points are not improper, violations of the Texas Free Enterprise Act, violations of the DTPA, and injunctive relief. In particular, appellants claimed they needed additional discovery on their antitrust claims, their equitable defenses, and whether American had an adequate remedy at law. The gist of appellants' counterclaims is that American is a competitor and is unlawfully attempting to restrict their ability to maintain a competing business. Appellants' complaint fails initially because they failed to support their written motion for continuance with an affidavit as required by rule 251. Tex. R. Civ. P. 251. Generally, when a movant fails to comply with rule 251, we presume the trial court did not abuse its discretion by denying a motion for continuance. Villegas v. Carter, 711 S.W.2d 624, 626 (Tex. 1986); Sw. Country Enters., Inc. v. Lucky Lady Oil Co., 991 S.W.2d 490, 493 (Tex. App. -- Fort Worth 1999, pet. denied); see also Tri-Steel Structures, Inc. v. Baptist Found. of Tex., 166 S.W.3d 443, 448B49 (Tex. App. -- Fort Worth 2005, pet. denied) (holding that trial court did not abuse its discretion by denying motion for continuance when not in proper "affidavit form").

Appellants did not comply with rule 251; thus, we conclude and hold that the trial court did not abuse its discretion by denying their motion for continuance. Moreover, if necessary to protect a proven legal right, a temporary injunction may issue even if it has the effect of restraining competition, so

long as it is narrowly tailored to preserve the status quo. Sharma, 231 S.W.3d at 428B29 ("While ordinarily a temporary injunction should operate as a corrective rather than a punitive measure, when a choice must be made between a failure to provide adequate protection of a recognized legal right and the punitive operation of the writ, the latter course must be taken."). We overrule appellants' fourth issue.

Proof of Injury

Appellants' fifth issue complains that American failed to meet its burden to prove that it was injured. American alleged that it is injured by Frequent Flyer's actions because customers who purchase void rewards points from appellants (because those purchases violate the no-sale rule) would likely have purchased tickets from American had they not obtained the void tickets; thus, those customers likely displaced other AAdvantage® members or other paying American customers who would have purchased tickets had the seats not been occupied by travelers using the void tickets. American also alleged that it lost goodwill with AAdvantage® members in that those members were prevented from using their AAdvantage® rewards points because seats were occupied by persons using the void tickets. Appellants contend that American "offered no evidence of any identified passenger, actual or potential, who suffered any aspect of [American's] litany of claimed injuries."

A party proves irreparable injury for injunction purposes by proving that damages would not adequately compensate the party or cannot be

measured by any certain pecuniary standard. Butnaru, 84 S.W.3d at 204; Fox, 121 S.W.3d at 857. An injunction is not proper when the claimed injury is merely speculative, however; fear and apprehension of injury are not sufficient to support a temporary injunction. Jordan v. Landry=s Seafood Rest., Inc., 89 S.W.3d 737, 742 (Tex. App. -- Houston [1st Dist.] 2002, pet. denied) (op. on reh'g). American offered the testimony of Jim Balsom, Manager of AAdvantage® systems and partner support. He testified without objection that American is reluctant to challenge the veracity of AAdvantage® members' representations when booking travel because "that would not engender goodwill[;] in fact, [it would] probably cost [American] significant goodwill if we were to do that." Additionally, he testified that such an inquiry "[w]ould take [a] significant amount of time and add significantly to [American's] costs."

Balsom further testified that brokering operations such as Frequent Flyer's "cause[] customers to question [American's] ability to manage and maintain the program and deliver the benefits that we've promised to customers." He said that when American discovers a void transaction due to Frequent Flyer's activities, its business is disrupted and it must divert resources away from legitimate customers to deal with the void transactions. He also testified that freezing the AAdvantage® accounts at issue causes ill will for the member. Balsom further stated that dealing with these types of transactions causes "operational difficulties or issues."

Regarding displacement, Balsom testified that when Frequent Flyer sells an AAdvantage® member's

rewards points to a third party, that third party displaces a customer "who would either pay cash for that ticket or . . . who would redeem AAdvantage® miles for the seat." He said it also "does use resources through [American's] reservations office [and] potentially AA.com for other business purposes" instead of valid ticket sales.

Appellants challenge American's displacement evidence, pointing to Securities and Exchange Commission reports filed by AMR, American's parent company, showing that, generally, between 2003 and 2007, twenty to thirty percent of seats on American's flights were empty. It also points to statements in those reports to the effect that, with respect to the AAdvantage® program, AMR "believes displacement of revenue passengers is minimal given the Company's load factors, its ability to manage frequent flyer inventory, and the relatively low ratio of free award usage to total passengers boarded." According to appellants, absent evidence from specific flights on which displacement occurred, American cannot overcome this evidence of empty seats on its flights.

The SEC filings do not give information for specific flights; indeed, the vacancies in paying seats may be higher due to higher numbers of business travelers paying a lower price for rewards points tickets through Frequent Flyer than paying for typical full-fare seats.[6] And the isolated statement that displacement is minimal is clearly in relation to the function of the program according to its guidelines; in other words, passenger displacement is minimal when the program is operating without outside influences.

American points to additional evidence as supporting the proof of injury requirement, such as the fact that it is virtually impossible to police appellants' actions (when American discovers a void ticket, Frequent Flyer simply buys more miles and issues a new one), that American has to devote resources to investigating and policing appellants' actions that disrupt its operation and divert its resources from legitimate customers, and the unobjected-to evidence that American's inability to police activities such as Frequent Flyer's causes AAdvantage® members to question its ability to effectively run the program. Disruption to a business can be irreparable harm. Lavigne v. Holder, 186 S.W.3d 625, 629 (Tex. App. --- Fort Worth 2006, no pet.); David v. Bache Halsey Stuart Shields, Inc., 630 S.W.2d 754, 757 (Tex. App. -- Houston [1st Dist.] 1982, no writ) ("This harm would not only disrupt the organized business dealings of Bache but would also threaten customer confidence in Bache's handling of their private affairs, and probably cause Bache to lose not only customers but profits as well."). Moreover, assigning a dollar amount to such intangibles as a company's loss of clientele, goodwill, marketing techniques, and office stability, among others, is not easy. Martin v. Linen Sys. for Hosps., Inc., 671 S.W.2d 706, 710 (Tex. App. -- Houston [1st Dist.] 1984, no writ).

American offered specific, undisputed evidence of intangible harm to its business, including the AAdvantage® program, resulting from appellants' actions. Balsom's testimony was not speculative and is supported by the Pirkles' own testimony about Frequent Flyer's operations, specifically, its instructions to AAdvantage® members intended to conceal its activities from American.

We conclude and hold that American presented evidence of an irreparable injury. Thus, we overrule appellants' fifth issue.

Adequate Remedy

In their sixth issue, appellants claim that if American presented sufficient evidence to meet its burden of proof as to injury, that same evidence shows that American has an adequate remedy in damages. Specifically, appellants claim that damages can be calculated easily from AMR's SEC filings if American can provide the identity of specific displaced passengers. They also contend that American cannot show lost profits because it has not made any profit since at least 2002.
American counters that even if damages can be assigned to displaced passengers, appellants "do not refute the evidence . . . that their conduct disrupts American's business . . . in many ways and affects the reputation and loyalty it has developed over years with its customers."

An adequate remedy is one that is as complete, practical, and efficient to the prompt administration of justice as is equitable relief. Mabrey, 124 S.W.3d at 317. Damages are an inadequate remedy if they are difficult to calculate. Id. at 318-19.

According to American, while the evidence appellants point to may show that some of its damages are calculable, it does not show a way to calculate damages for American's claims of loss of goodwill and other intangibles. We agree. As we have already stated, the intangible types of injuries testified to by Balsom are the types of injuries to

which a dollar value may not easily be assigned. Martin, 671 S.W.2d at 710. A remedy is not adequate simply because some of the proven damages are calculable. See Tex. Indus. Gas v. Phoenix Metallurgical Corp., 828 S.W.2d 529, 532 (Tex. App. -- Houston [1st Dist.] 1992, no writ) ("For a legal remedy to be adequate, it must give the applicant complete, final, and equal relief."); see also Towers v. Grogan, No. 01-97-00946-CV, 1998 WL 191760, at *4 (Tex. App. -- Houston [1st Dist.] Apr. 23, 1998, no pet.) (not designated for publication) (holding that although some breach of contract damages were calculable, specific damages for which Grogan sought injunctive relief were intangibles, incapable of being measured by damages).

We conclude and hold that American proved that damages are not adequate to fully compensate it for its injuries. Accordingly, we overrule appellants' sixth issue.

Equitable Concerns

Appellants' seventh issue raises equitable claims, including laches and unclean hands.

Appellants first contend that American's temporary injunction claim is barred by laches because American has failed to take action against appellants despite knowing since 2002 the type of business Frequent Flyer was engaged in. Appellants claim Frequent Flyer has been prejudiced by American's inaction because the Pirkles never would have expanded the business since 2002 had they known American objected to Frequent Flyer's conduct.

A party asserting the defense of laches must show both an unreasonable delay by the other party in asserting its rights and harm resulting to it because

of the delay. Rogers v. Ricane Enters. Inc., 772 S.W.2d 76, 80 (Tex. 1989); In re Roxsane R., 249 S.W.3d 764, 771 (Tex. App. -- Fort Worth 2008, orig. proceeding). Here, we have already discussed the lack of evidence that American knew or should have known of appellants' activities when its lawyer contacted George Pirkle in 2002 about the domain names. In addition, we have also pointed to the evidence that Frequent Flyer purposefully concealed its dealings from American and instructed AAdvantage® members to do the same. Accordingly, we do not believe that the evidence shows that American deliberately slumbered on its rights with regard to appellants' conduct.

Moreover, there was evidence from which the trial court could have concluded that appellants failed to show prejudice; the trial court elicited testimony from George that Frequent Flyer's expansion also had to do with increased trade in other airlines' frequent flyer miles. George also testified that he had been aware of American's no-sale provision since at least 2005 because American had stopped travel on tickets bought with rewards points sold by Frequent Flyer before that time. Accordingly, we conclude and hold that the trial court did not abuse its discretion by rejecting appellants' claim of laches. Appellants contend that American has unclean hands because "the evidence shows that [American] is part of an illegal conspiracy with regard to the antitrust laws of the United States and the State of Texas." According to appellants, the temporary injunction prevents (and American's suit seeks to prevent) them from competing with American. Appellants also claim that American must do equity to obtain equity and that American has failed to do

so by authorizing Points.com and its airline partners to trade with members for AAdvantage® rewards points. This argument appears to incorporate appellants' antitrust and anticompetition claims. But as we have already held, an otherwise proper injunction will not be rendered improper by claims that such an injunction would have a preclusive effect on competition. See Sharma, 231 S.W.3d at 429. Thus, we conclude and hold that the trial court did not abuse its discretion by rejecting appellants' equitable defenses.

We overrule appellants' seventh issue.

Conclusion

Having overruled all of appellants' issues, we affirm the trial court's order granting the temporary injunction.

TERRIE LIVINGSTON
JUSTICE
PANEL: LIVINGSTON, DAUPHINOT, and MCCOY, JJ.

DELIVERED: February 26, 2009

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[1]American says in its brief that the depositions had been delayed due to George Pirkle's poor health; appellants do not dispute this.

[2]Appellants do not challenge on appeal whether American proved a probable right to recover on its causes of action.

[3]George and Robert both testified that Frequent Flyer instructs customers who purchase rewards points from it to tell American that the points are a gift and that such representations are lies.
[
4]The agreement also states that American "may amend its rules of the Program at any time without notice."

[5]Moreover, we note that, as a practical matter, American is effectively conceding the enforceability of the User Agreements. Appellants criticize American for relying on cases construing similar airline passenger incentive agreements because in those cases the passengers themselves-who were seeking to enforce the agreements-conceded the existence of enforceable agreements. See Mozingo v. Alaska Air Group, Inc., 112 P.3d 655, 661B62 (Alaska 2005); Grossman v. USAir, Inc., 33 Phila. Co. Rptr. 427, 431B32 (C.P. 1997). But the key factor that makes this case similar to those is that the party seeking enforcement-here, American-effectively concedes enforceability of the agreements by attempting to enforce them.

[6]As the United State Supreme Court noted in Morales,

> The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers). Accordingly,

> airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). In order for this marketing process to work, and for it ultimately to redound to the benefit of price-conscious travelers, the airlines must be able to place substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate), and must be able to advertise the lower fares.

504 U.S. at 389, 112 S. Ct. at 204

TEMPORARY INJUNCTION ORDER

No. 067-224132-07
IN THE JUDICIAL DISTRICT OF
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

AMERICAN AIRLINES, INC.
V.
FREQUENT FLYER DEPOT, INC.

TEMPORARY INJUNCTION ORDER

After review of the pleadings, evidence presented, case law cited, arguments of counsel and the Court's trial notes, the Court finds as follows:

1. Plaintiff American Airlines, Inc. is a commercial airline that has designed and implemented a frequent flyer program known as AAdvantage® to develop passenger loyalty and reward its best customers;
2. Customers who become members of the AAdvantage® program may accrue mileage credit by flying on American or its partners airlines and by other means. Members in the AAdvantage® program must abide by the Terms and Conditions of the program to maintain eligibility for its benefits. The AAdvantage® Terms and Conditions may be found in the AAdvantage® program application and on American's website, AA.com. The Terms and Conditions of the AAdvantage®

program prohibit the purchase, sale or barter of AAdvantage® mileage credit or award tickets;

3. Defendants Frequent Flyer Depot, Inc., George Pirkle, and Robert Pirkle are in the business of purchasing and selling AAdvantage® mileage credit and award tickets;

4. American produced evidence of and demonstrated a probable right of recovery against defendants Frequent Flyer Depot, Inc., George Pirkle, and Robert Pirkle on its claims of fraud, tortious interference with contract and misappropriation;

5. American has also shown that it will suffer immediate and irreparable loss, injury and damage if a temporary injunction does not issue before trial and that it has no adequate remedy at law; and

6. American has shown its willingness to post bond.

For the foregoing reasons, the Court ORDERS:

From the date of entry of this Temporary Injunction through the completion of trial of this matter defendants Frequent Flyer Depot, Inc., George Pirkle, Robert Pirkle, and their successors and assigns, and their respective officers, agents, affiliates, employees, and attorneys, and all persons in active concert or participation with any one or more of them, are enjoined and restrained from the following:

(a) Purchasing, brokering, or bartering AAdvantage® mileage credit or AAdvantage®) award tickets;

(b) Selling, offering for sale or providing any person AAdvantage® mileage credit or AAdvantage award tickets; and

(c) Soliciting any person for the actions prohibited in (a) and (b) above.

American will post bond in the amount of $100,000.00.

Final trial of this matter is set for the week beginning May 11, 2009.

This Temporary Injunction will remain in effect until further order of this Court, after trial on the merits of American's Petition or other final resolution of this matter.

IT IS SO ORDERED.

Signed this 19th day of September, 2008.

/s/ Donald Cosby
The Honorable Don Cosby

No. 067-224132-07

AMERICAN AIRLINES, INC.

V.

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE, ROBERT PIRKLE, LTS, LUXURY TOUR SOURCE, LTD., MUKESH KUMAR GOYAL, MAIN ST. TRAVEL CENTER OF MONSEY, INC., BEN WEBER, ISRAEL ODZE, and JOHN DOE I.

IN THE JUDICIAL DISTRICT OF TARRANT COUNTY, TEXAS 67TH JUDICIAL DISTRICT

PLAINTIFF'S THIRD AMENDED PETITION

Plaintiff American Airlines, Inc., through its attorneys, brings this action against defendants Frequent Flyer Depot, Inc., George Pirkle, Robert Pirkle, Luxury Tour Source, Ltd, Mukesh Kumar Goyal, Main St. Travel Center of Monsey, Inc., Ben Weber, Israel Odze, and John Doe I for damages and injunctive relief. Based upon actual knowledge with respect to itself and its own acts, and upon information and belief as to all other persons and matters, American respectfully alleges as follows:

Discovery Level

1. Based on the relief sought, discovery should be conducted under a Level 3 plan pursuant to Texas Rule of Civil Procedure 190.4.

Nature of the Action

2. This is a suit for damages and injunctive relief arising from unlawful sales of American's valuable property. Defendants are in business to profit from wrongfully targeting American's frequent flyer AAdvantage program, based and operated in this County. In so doing, they are undermining the program's objectives and causing American to transport passengers on its flights without compensation, by unlawfully selling award tickets procured with wrongfully obtained frequent flyer mileage credit.

Parties

3. American is a Delaware Corporation with its headquarters in this County, at 4333 Amon Carter Boulevard, Fort Worth, Texas 76155.

4. Defendant Frequent Flyer Depot, Inc. ("FFD") is a Texas corporation with its headquarters located at 164 Bushwhacker, Mabank, Texas 75156. It has been served with process and appeared in the suit. It owns and operates websites located at www.FrequentFlyerDepot.com, www.FrequentFlyerDepot.net, www.ffdintemational.com, www.ffdepot.com, and www.ffdepot.net.

5. Defendant George Pirkle is an individual whose office address is 164 Bushwhacker, Mabank, Texas 75156. He has been served with process and appeared in the suit. He is President and CEO of FFD.

6. Defendant Robert Pirkle is an individual whose office address is 164 Bushwhacker, Mabank, Texas 75156. He has been served with

process and appeared in the suit. He is an employee of FFD.

[Paragraphs 7 – 12 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Jurisdiction and Venue

13. This Court has subject matter jurisdiction over this case because the amounts in controversy are within its jurisdictional limits.

14. This Court also has personal jurisdiction over defendants, who each has continuous and systematic contacts with Texas and who each committed torts and/or breached contracts in this State. The injuries they have inflicted and threaten to further inflict on American are felt in this State, and they know or should know that serious harmful effects from their conduct will and did occur here.

[Paragraphs 15 – 18 are omitted as they do not relate to the claims against Frequent Flyer defendants]

19. Venue in this matter is proper in this County, pursuant to Texas Civil Practice & Remedies Code § 15 .002. A substantial part of the activities, events, and damages giving rise to this lawsuit occurred in this County.

Damages

20. Subject to further discovery on the causes of action alleged against all defendants, at this time American seeks maximum actual damages from defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle of $150,000, exclusive of attorney's fees, costs of suit, exemplary damages, and such pre- and post-judgment interest as may be allowed by law.

[Paragraphs 21 & 22 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Facts Giving Rise to This Action

A. American's Efforts to Protect Its Property

23. Over the last 75 years, Fort Worth-based American has grown to be the largest commercial airline in the world, with the greatest number of passengers carried, the most revenue passenger miles flown, and the largest fleet of planes.

24. American's AAdvantage® frequent flyer program is designed to develop passenger loyalty and increase revenues by rewarding its best customers -- those who regularly fly American. It is the oldest and most used frequent flyer program in the industry. Membership is limited to individuals.

25. In exchange for adhering to the AAdvantage contract that sets out the rules governing the program and its members, members accrue mileage credit by flying on American or its

partner airlines, staying at hotel partners, renting a car from a partner company, or by other means. Mileage credit accrues only to the account of the member who flies, stays at a hotel, rents a car, or earns it by other lawful means. In consideration for accumulating specified amounts of mileage credit, members earn award tickets for free travel on American or its partner airlines, upgrades to a higher class of service, and other benefits. AAdvantage award tickets and upgrades may be issued in any name designated by the AAdvantage member at the time the request is made.

26. The AAdvantage contract is made available to members and the public in several written forms, including in the program application and on American's website, AA.com. The rules in the AAdvantage contract state, "accrued mileage credit and award tickets do not constitute property of the members." They belong to American. American protects them by prohibiting their purchase, sale, or barter and enforcing penalties for violations, a term known as the "No-Sale Rule." Specifically, (i) "Any such mileage or tickets are void if transferred for cash or other consideration"; (ii) "Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding"; and (iii) "If a trip has been started, any continued travel will be at the cost of a full fare ticket for any segments flown on a sold or bartered ticket."

27. American seeks to enjoin and recover damages resulting from defendants' widespread violations of the No-Sale Rule.

[Paragraphs 28 - 37 are omitted as they do not relate to the claims against Frequent Flyer defendants]

C. Defendant FFD's Wrongful Conduct

38. FFD is in business to broker the sale of AAdvantage mileage credit and award tickets from AAdvantage members to American's potential customers, all without compensation to American. It operates its business with knowledge that under the AAdvantage contract, neither mileage credit nor award tickets may be purchased, bartered, or sold, and that mileage and tickets are void if transferred for cash or other consideration. FFD's actions are calculated to target and injure the AAdvantage program.

39. FFD operates through the domain names www.FrequentFlyerDepot.com, www.FrequentFlyerDepot.net, www.ffdinternational.com, www.ffdepot.com, and www.ffdepot.net, which are the same website. The site announces, "Starting in Dallas, Texas, Frequent Flyer Depot has been in business since 1992." It "provides professional brokerage of all frequent flyer miles and mileage rewards worldwide." "We are the premiere online brokerage of frequent flyer tickets and mileage rewards" and "provide a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades."

40 . The website lists the price that FFD will pay for mileage credit, and Advantage mileage credit is its most valuable. It offers to pay "1.8 cents per mile on AA," more than any other domestic airline.

The website also lists the ticket prices for international travel. For example, a roundtrip ticket from the 48 States, Alaska, and Canada to Europe sells for $2695 for business class and $3695 for first class.

41. Despite knowledge of the No-Sale Rule, FFD's website misleads program members by stating: "Although airline policy discourages buying or selling miles, it is NOT against the law for you to buy or sell frequent flyer awards."

42. The website requests potential buyers and sellers to call, email, or fax FFD the type and amount of miles they wish to buy or sell. FFD matches a seller -- the AAdvantage member -- with a buyer -- American's potential customer. The AAdvantage member then uses his mileage credit to make a reservation with American in the name of the buyer, concealing the fact that the ticket will be sold. American, without knowledge of this fact, issues the requested award ticket. The buyer then wires money for the ticket to FFD's brokerage account, where it is held until FFD receives an E-ticket number or the hardcopy ticket from the seller. Upon receipt, FFD releases the buyer's money, minus its fee, to the seller via wire transfer. American incurs costs to transport the customer who paid FFD -- not American -- for the ticket. American receives no compensation in the transaction.

43. FFD has induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to FFD, in violation of the No-Sale Rule; to contact American reservations -- including call centers in Texas -- to request issuance

of award tickets in the names of individuals to whom FFD has wrongfully sold the tickets; and to conceal from American their intention to sell their mileage credit and award tickets to FFD.

44. FFD has made misleading statements that induced those who purchased the wrongfully-obtained AAdvantage award tickets to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite its knowledge that award tickets are void once purchased or sold.

45. Numerous individuals have traveled on American using void award tickets wrongfully sold by FFD. They likely would have purchased tickets from American had they not obtained the void award tickets from FFD. Furthermore, they likely displaced legitimate AAdvantage members or American customers who would have purchased tickets had the seats occupied by travelers with void award tickets been available.

46. By way of example, between May 21, 2005 and May 22, 2007, FFD bought 600,000 mileage credits from one AAdvantage member and induced him to cause American to issue six award tickets valued at almost $42,000 in consideration for his mileage, including four tickets routed through DFW International Airport.

47. FFD has wrongfully bought at least 860,000 AAdvantage mileage credits and fraudulently obtained at least nine award tickets valued at almost $70,000. American has paid to transport these passengers without compensation. In

addition, FFD purchased 440,000 in mileage credit and fraudulently obtained four award tickets that American did not honor for travel because its investigation determined that the tickets had been sold and thus were void.

48. American has lost goodwill with AAdvantage members prevented from obtaining free award travel on American because these seats were occupied by individuals using wrongfully-obtained tickets, and with the general public who paid higher prices to American for valid tickets than those offered by FFD for wrongfully-obtained tickets. American also has been forced to expend significant resources to investigate FFD's improper activities.

49. Because AAdvantage mileage credit and award tickets are highly valuable, and because FFD is in business solely to barter, purchase, and sell them, it is likely that FFD will continue its wrongful activities.

D. Defendants George and Robert Pirkle's Wrongful Conduct

50. FFD's business is built on targeting the AAdvantage program and profiting from violating its rules. George Pirkle is President and CEO of FFD. He has detailed knowledge of its wrongful operations and personally directed, authorized, and participated in them. Robert Pirkle is an officer or manager of FFD. He also has detailed knowledge of its wrongful operations and personally directed, authorized, and participated in them.

51. By way of example, on February 20, 2007, George Pirkle sent a letter by email to an AAdvantage member stating, "We are busy as ever here at Frequent Flyer Depot and always in need of large quantities of airline miles. The main airline miles we Broker are: American ..."

52. The Pirkles have misrepresented that American merely "discourages buying or selling miles," deliberately omitting the fact that it prohibits buying or selling miles.

53. In addition, in violation of the No-Sale Rule, Robert Pirkle wrongfully purchased an award ticket issued by American at the request of an AAdvantage member and used to it fly roundtrip from DFW International Airport.

54. Because AAdvantage mileage credit and award tickets are highly valuable, and because the Pirkles are directly involved in management of FFD, a business built on defrauding American, it is likely that they will continue to wrongfully barter and sell mileage credit and award tickets.

[Paragraphs 55 - 95 are omitted as they do not relate to the claims against Frequent Flyer defendants]

First Cause of Action
(Tortious Interference with Contract)

96. American realleges the material facts alleged in the preceding paragraphs.

97. The AAdvantage rules set forth the terms of a contract between American and AAdvantage members and govern the use of AAdvantage mileage credit and award tickets.

98. At all material times, defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I have known that the AAdvantage rules prohibit the sale of AAdvantage mileage credit and award tickets.

99. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, and Odze acted with a willful desire and intent to hinder and interfere with, and are continuing to interfere with, American's contracts with AAdvantage members by inducing members to breach their contracts by selling mileage credit and/or award tickets and upgrades in violation of the program rules.

100. Doe I acted with a willful desire and intent to hinder and interfere with, and is continuing to interfere with, American's contracts with AAdvantage members by fraudulently depleting mileage credit and misappropriating award tickets from their accounts and selling these award tickets, hindering the members' performance of their contracts.

101. Defendants' interference has caused and continues to cause American to provide free air travel to passengers who were not entitled to it. The revenues that properly should have been received by American for transporting these passengers have been and continue to be wrongfully diverted to these defendants.

102. As a proximate result of defendants' tortious interference, American has suffered injury and damages, including being deprived of the benefits that the AAdvantage program was designed to engender, including passenger loyalty and revenues.

103. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to interfere with American's contract rights with additional AAdvantage members. Accordingly, American is entitled to injunctive relief.

Second Cause of Action
(Tortious Interference with Prospective Relations)

104. American realleges the material facts alleged in the preceding paragraphs.

105. The customers of defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I that flew on American by using void tickets likely would have entered into a business relationship with American. AAdvantage members who sought to travel on American, either by purchasing a ticket or by redeeming their mileage credit for award tickets they have earned, likely were not able to obtain tickets because passengers traveling on wrongfully-obtained award tickets occupied seats that American would have used to accommodate its AAdvantage customers. Other customers who desired to fly on American and sought

to purchase tickets from American or its authorized travel agents likely could not obtain tickets or services on American because passengers traveling on wrongfully-obtained award tickets occupied seats that American needed to accommodate paying customers.

106. These defendants wrongfully and intentionally interfered with American's reasonable expectation of these prospective contractual relationships.

107. The fraudulent misrepresentations of these defendants in wrongfully obtaining AAdvantage mileage credit and award tickets were independently tortious.

108. These defendants' tortious interference was the proximate cause of American's injury because their customers purchased wrongfully-obtained American tickets from them instead of from American and occupied seats that American would have used to accommodate its AAdvantage members or other paying customers.

109. American suffered actual damages due to interference by these defendants. They caused American to provide free air travel to customers who were not entitled to it, depriving it of revenue it could have earned by selling tickets to AAdvantage members or other paying customers, as well as of the customer loyalty and economic benefits that the AAdvantage program was designed to engender. Revenues that properly should have been received by American for transporting these defendants' customers, AAdvantage members, or other paying

customers have been wrongfully diverted to these defendants.

110. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to interfere with American's prospective relations with additional AAdvantage members and the general flying public. Accordingly, American is entitled to injunctive relief.

Third Cause of Action
(Misappropriation)

111. American realleges the material facts alleged in the preceding paragraphs.

112. American expends extensive labor, skill, and financial resources in operating its airline. Air transportation on American flights, the product created through these efforts and represented by American tickets, has substantial commercial value because American transports customers on flights throughout the globe.

113. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, Odze, and Doe I compete with American by selling for valuable consideration wrongfully-obtained award tickets for American flights for which it receives no compensation, gaining a special advantage in that competition because these defendants are burdened with none of the expense incurred by American in operating its airline.

114. The conduct of these defendants causes commercial damages to American by diverting money paid for the wrongfully-obtained award tickets away from American and to these defendants and causing American to provide free air transportation to passengers who were not entitled to it and incur costs in providing such free air transportation.

115. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by defendants. In the absence of an injunction, defendants are likely to attempt to misappropriate tickets for American flights. Accordingly, American is entitled to injunctive relief.

Fourth Cause of Action
(Fraud)

116. American realleges the material facts alleged in the preceding paragraphs.

117. Defendants FFD, George Pirkle, Robert Pirkle, LTS, Goyal, Main St., Weber, and Odze have concealed from American certain material facts. These defendants fraudulently obtained award tickets from American by calling, and directing their employees and AAdvantage members to call, American to make reservations in the names of passengers, knowing that these passengers would fly using void tickets because they would be sold. In addition, defendant Weber reached out to American to generate more business between American and Main St. but failed to disclose Main St.'s wrongful actions in fraudulently obtaining award tickets from

American. By failing to disclose these facts, defendants created a false impression with knowledge that American was ignorant of these facts and did not have an equal opportunity to discover them.

118. These defendants were deliberately silent when the false impression they made created a duty to speak. They failed to disclose these facts with the intent of inducing American to issue award tickets on behalf of their customers.

119. In justifiable reliance upon these defendants' nondisclosures, American issued hundreds of award tickets for free travel to passengers not entitled to it.

120. In addition, Doe I has made numerous material misrepresentations. He falsely represented that he was an AAdvantage member entitled to book award tickets on American. He misrepresented or failed to disclose numerous violations of the AAdvantage rules with the intent of inducing American to issue award tickets on behalf of his customers. These misrepresentations and omissions were material because American only will issue award tickets based on mileage credit from a member's account in response to a request from that member and in accordance with AAdvantage rules.

121. He made these misrepresentations knowing they were false statements. He made them to American with the intent that it would rely on them and provide his customers with AAdvantage award tickets to which they were not entitled and for which American would receive no payment. In

justifiable reliance upon his misrepresentations, American issued award tickets for free travel to passengers not entitled to it.

122. American has suffered damages because of defendants' nondisclosures and misrepresentations. It has incurred costs in providing free travel to passengers not entitled to it, including the cost it must pay its partner airlines to provide air travel to AAdvantage members using award tickets; lost revenue from providing free travel to passengers not entitled to it in lieu of selling tickets and service to those passengers and to other potential customers; lost goodwill with AAdvantage members who are entitled to free or upgraded travel on American but prevented from obtaining it because seats that would otherwise have been available are occupied by passengers with fraudulently obtained tickets; lost goodwill from the general flying public who wish to travel on American but are prevented from obtaining tickets because seats that would otherwise have been available are occupied by passengers with fraudulently obtained tickets; and lost goodwill with the general public who must buy seats from American at prices higher than those offered by defendants for fraudulently-obtained award tickets. In addition, American has lost goodwill with AAdvantage members whose mileage credit was fraudulently depleted, requiring redeposits of the mileage into the members' accounts with no compensation.

123. In addition, American has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate it for injuries inflicted by defendants.

In the absence of an injunction, defendants are likely to continue to make fraudulent misrepresentations or nondisclosures to American to obtain award tickets and wrongfully sell those tickets through the Internet. Accordingly, American is entitled to injunctive relief.

Fifth Cause of Action
(Breach of Contract)

124. American realleges the material facts alleged in the preceding paragraphs.

125. Pursuant to the AAdvantage contract between American and program members, defendants Robert Pirkle, and Goyal agreed to comply with the rules, regulations, and procedures of the AAdvantage program. They materially breached the contract by purchasing or selling mileage credit and award tickets, in violations of the No-Sale Rule.

126. Pursuant to the Addendum, defendant Main St. agreed to comply with the prohibition on the issuance of award tickets and upgrades that were purchased, bartered, or sold. It materially breached the Addendum by issuing award tickets and upgrades that were purchased, bartered, or sold. American has issued a debit memo to Main St. which it has failed to pay, in further violation of the Addendum.

127. As a proximate result of defendants' breaches of the AAdvantage contract and the Addendum, respectively, American has suffered damages including the cost of providing free travel to passengers not entitled to it; lost revenue from

providing free travel to passengers not entitled to it in lieu of selling tickets and service to those passengers and to other potential customers; and lost goodwill with AAdvantage members and the general flying public who wish to travel on American but are prevented from obtaining tickets because seats that would otherwise have been available are occupied by passengers with wrongfully-obtained tickets.3

[Paragraphs 128 - 134 are omitted as they do not relate to the claims against Frequent Flyer defendants]

Prayer for Relief

American respectfully requests judgment, after trial or final hearing, as follows:

1. That the Court enter judgment against defendants that they have:

a. Interfered with the contracts and prospective business relations of American, with a conscious desire to hinder or prevent those business relationships;

b. Wrongfully misappropriated valuable AAdvantage award tickets for air transportation;

c. Wrongfully obtained and sold AAdvantage mileage credit and award tickets;

d. Wrongfully depleted AAdvantage mileage credit and obtained AAdvantage award tickets;

e. Breached the terms of the AAdvantage contract (as to defendants Robert Pirkle, and Goyal);

f. Breached the terms of the Addendum (as to defendant Main St.);

g. Violated the Texas Anti-Dilution Act (as to defendants LTS and Goyal);

h. Committed trademark infringement (as to defendants LTS and Goyal);

i. Otherwise injured the business reputation or goodwill of American by the acts set forth in this Petition.

2. That the Court issue preliminary and permanent injunctive relief against all defendants that they and all others in active concert or participating with them, be enjoined and restricted from engaging in the following conduct, directly or indirectly, individually or through any entity, anywhere in the world:

a. Participating in any manner in brokering, soliciting, purchasing, offering for sale, selling, or bartering AAdvantage mileage credit and award tickets;

b. Counseling, advising, or providing information to any individual or entity regarding purchasing airline tickets obtained with purchased, sold, bartered, or brokered AAdvantage mileage credit or award tickets;

c. Utilizing or disclosing the names, addresses, telephone numbers, or account numbers of AAdvantage members in any manner or for any purpose that is prohibited by the terms of this injunction;

d. Obtaining or using airline tickets based in whole or in part on AAdvantage mileage credit and award tickets;

e. Opening, using, assigning, or accepting assignment of any AAdvantage account, mileage credit, or award ticket; and

f. Placing or distributing any advertisement, in any medium, which solicits or advertises the purchase, sale, brokering, or bartering of AAdvantage mileage credit or award tickets.

3. In addition, American is entitled preliminary and permanent injunctive relief against all defendants requiring them to do the following:

a. Deliver to American all AAdvantage award tickets, accounts statements, and related documents in their possession, custody, or control;

b. Deliver to American all documents and data in their possession, custody, or control relating to the purchase, brokering, solicitation, or barter of AAdvantage mileage credit or award tickets;

c. Deliver to all entities and persons with whom they have communicated, interacted, or provided services within the last 24 months relating to AAdvantage mileage credit or award tickets a copy of this injunction entered by the Court and a notice advising that they have permanently ceased purchasing, selling, brokering, and bartering AAdvantage mileage credit and award tickets; and

d. Deliver to American a complete list of all entitles and persons to which the notice described in subparagraph (c) has been sent.

4. That the Court order all defendants to disgorge to American all revenues received by them as a result of the wrongful conduct alleged above.

5. That the Court order all defendants to pay actual and exemplary damages to American, plus its costs and reasonable attorney fees incurred in prosecuting this action; and

6. That the Court grant to American all additional relief to which it has shown itself to be justly entitled, whether at law or in equity.

Respectfully submitted,
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ATTORNEYS FOR PLAINTIFF
AMERICAN AIRLINES, INC.

[Certificate of Service omitted]

FREQUENT FLYER DEFENDANT'S SECOND AMENDED ANSWER

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC., et. al.

IN THE DISTRICT COURT
67TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

COUNTERCLAIM

Frequent Flyer Depot, Inc. ("Frequent Flyer Depot"), George Pirkle ("George") and Robert Pirkle ("Robert") (jointly the "Frequent Flyer Depot defendants") file their counterclaim against American Airlines, Inc. ("American").

STATEMENT OF THE CASE

American joined the Frequent Flyer Depot as defendants in this case with other companies and persons with whom the Frequent Flyer Depot defendants have never had any relationship. [FN]1 The Frequent Flyer Depot defendants moved to sever the claims against them from the claims made against the other defendants. The Motion to Sever was denied.

Luxury Travel Source, Mukesh Kuhmar Goyal, Main St. Travel Center of Monsey, Inc. and Ben Weber

filed special appearances. They are appealing the denials of their special appearances to the Second Court of Appeals in Fort Worth, Texas. The appeal is set for submission by brief before the Court of Appeals on September 9, 2008.

The defendants have moved to dismiss American's claims pursuant to the preemption provisions of the Airline Deregulation Act of 1978.

The Frequent Flyer Depot defendants, Luxury Travel and Mukesh Kuhmar Goyal have filed their Motion for Partial Summary Judgment.

[FN1] The presence of the Frequent Flyer Depot defendants in this case destroys diversity jurisdiction.

To the knowledge of the Frequent Flyer Depot defendants, the other named defendant and the Doe defendants have not been served.

PARTIES TO COUNTERCLAIM

1. American is a Delaware corporation with its principal place of business in Fort Worth, Texas. American is the world's largest commercial passenger airline. American is an airline partner of American Eagle Airlines, both wholly owned by the AMR Corporation holding company.

2. Frequent Flyer Depot is a Texas corporation with its only place of business in Mabank, Texas.

3. Frequent Flyer Depot acts as a broker of frequent flyer miles and travel awards. Frequent

Flyer Depot assists travelers and holders of frequent flyer miles in the purchase and sale of frequent flyer tickets, mileage rewards, and upgrades.

4. American and Frequent Flyer Depot are competitors.

5. George is an employee and the president of Frequent Flyer Depot.

6. Robert is an employee of Frequent Flyer Depot and a member of American's AAdvantage program.

SALE OF TICKETS

7. American competes in the sale of airline tickets with other airlines, with persons engaged in the sale of airline tickets, and with other airlines and other persons engaged in the sale of tickets on American's flights. American also competes with persons engaged in the distribution, sale or barter of frequent flyer miles which are used to acquire airline tickets.

8. American systematically and intentionally discriminates among purchasers of its tickets. The price variations create demand and competition for lower priced airline tickets.

ELIMINATION OF COMPETITION

9. American seeks to and does eliminate competition from the unauthorized purchase of lower priced airline tickets through the sale or barter of AAdvantage frequent flyer miles, and from persons who sell lower priced tickets.

10. American has agreements with competitors restricting the unauthorized purchase, sale or barter of frequent flyer miles, and the unauthorized purchase of lower priced tickets by consumers.

11. American is part of a web of agreements among airlines and third persons which restricts and controls the exercise of airline frequent flyer miles and fixes the prices of airline tickets through restrictions on frequent flyer miles and on certain ticketing practices.

FREQUENT FLYER MILES

12. AAdvantage is American's travel awards program. AAdvantage frequent flyer miles can be obtained from American, from sources to whom American sells frequent flyer miles, from sources authorized by American to engage in the purchase, sale and barter of American's frequent flyer miles, and from unauthorized sources engaged in the purchase, sale and barter of frequent flyer miles.

13. AAdvantage frequent flyer miles can be used to obtain airline tickets from American and other airlines, and for the purchase of a variety of other goods and services from American and third persons.

14. American claims to have contracts with AAdvantage members in the form of the AAdvantage terms. These terms purport to prohibit the sale and barter of frequent flyer miles.

"ABUSIVE TICKETING"

15. American describes as "abusive ticketing" the use of validly issued tickets in a manner that results in lower fares. American uses terms such as "back to back," throwaway " and "hidden city" ticketing to describe "abusive ticketing ."

16. In its Conditions of Carriage, American prohibits "abusive ticketing."

AMERICAN'S PENALTIES

17. American claims the right to penalize passengers who violate American's rules.

18. American claims the right to penalize AAdvantage members who sell or barter their frequent flyer miles. The penalties are used to penalize AAdvantage members who do things of which American disapproves and fail to cooperate with American's efforts to eliminate unauthorized ticketing practices.

AMERICAN'S MISREPRESENTATIONS

19. American represents that contracts exist between AAdvantage members and American and that the frequent flyer miles have a value. These representations are false, misleading and deceptive in that no such contracts exist and any value that American's frequent flyer miles can be eliminated by American at any time.

20. American represents that AAdvantage program members are barred from selling or bartering their American frequent flyer miles. This representation is false, misleading and deceptive in

that there are no enforceable limitations on AAdvantage program members' right to sell or barter their frequent flyer miles.

21. American represents that AAdvantage frequent flyer program members and others are barred from purchasing or bartering their American frequent flyer miles. This representation is false, misleading and deceptive in that there are no enforceable limitations on AAdvantage frequent flyer program members' right to sell or barter his frequent flyer miles.

22. American made false representations to Robert Pirkle as an AAdvantage member and wrongfully sued Robert Pirkle for alleged violations of American's unenforceable AAdvantage terms and conditions.

AGREEMENTS AND THE PREVENTION OF THE SALE AND BARTER OF FREQUENT FLYER MILES AND "ABUSIVE TICKETING"

23. American seeks to prevent the purchase of lower priced tickets by consumers through the use of frequent flyer miles and "abusive ticketing." American is a party to numerous agreements with competitors to accomplish its ends.

24. American and other airlines own the close corporation known as Airlines Reporting Corporation or "ARC." The owners of ARC include Alaska Airlines, American Airlines, Continental Airlines, Delta Air Lines, Northwest Airlines, United Airlines and US Airways. ARC's board of directors include representatives from Alaska Airlines, American

Airlines, British Airways, Continental Airlines, Delta Air Lines, Hawaiian Airlines, Lufthansa German Airlines, Northwest Airlines, Southwest Airlines, United Airlines and US Airways.

25. Through its ARC agreements and addenda with travel agents, American imposes agreements on travel agents prohibiting "abusive ticketing" and the sale and barter of frequent flyer miles.

26. American and competing airlines use ARC procedures to enforce its restrictions and agreements and to punish persons who violate its agreements and restrictions. When utilized as described, ARC is a restraint of trade among the airlines.

28[sic]. With other airlines, American owns the Airline Tariff Publishing Company or ATPCO. The owners of ATPCO include Alaska Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., United Airlines and US Airways. APTCO publishes the latest airfares for more than 500 airlines multiple times per day.

29. ATPCO provides fare data in an electronic format with the encoded rules associated with those fares, which make the information suitable for computer processing. The users of the data are Global Distribution Systems (GDS), such as Sabre, Amadeus, and Travelport; the Computer Reservation Systems (CRS) of airlines and travel agents; online travel agencies such as Expedia, Orbitz, Travelmia and Travelocity; and other service providers in the travel industry.

30. An airline's latest fare changes can be loaded automatically, allowing these new fares to be sold in the market place in the shortest possible time. Fares are updated by APTCO three times a weekday in United States and Canada markets, five times each weekday for international markets, and twice Saturday and Sunday for all markets.

31. ATPCO gives American and other airlines the ability to monitor and discourage lower pricing of airline tickets.

32. American has code-sharing agreements with other airlines which include agreements on the issuance and use of frequent flyer miles and on "abusive ticketing." American's code-sharing agreements are with British Airways, Cathay Pacific Airways, Finnair, Iberia, Japan Airlines, LAN Airlines, Malev Hungarian Airlines, Qantas Airways, Royal Jordanian, Aer Lingus, Alaska Airlines, Brussels Airlines, China Eastern Airlines, EVA Air, Gulf Air, Hawaiian Airlines, Jet Airways and Mexicana.

33. American belongs to the oneworld alliance which includes agreements on the issuance and use of frequent flyer miles and on "abusive ticketing."

34. American has agreements with other airlines which fly under American's name brand which include agreements on the issuance and use of frequent flyer miles and on "abusive ticketing." Chautauqua Airlines and Trans States Airlines are American Connection airlines.

35. In addition to American, Chautauqua Airlines has agreements with Delta Air Lines, Continental Airlines, United Express and US Airways. Trans States Airlines has agreements with American, United Airlines and US Airways. Alaska Airlines has agreements with American, American Eagle, Continental, Delta and Northwest.

36. American has other agreements other airlines which relate to ticketing, and the issuance and use of frequent flyer miles, and "abusive ticketing." American Eagle is a subsidiary of American's parent corporation. American Eagle has agreements with Northwest Airlines, Delta Air Lines, and Continental Airlines.

37. American has agreements with others who sell airline tickets which relate to ticketing, and the issuance and use of frequent flyer miles, and "abusive ticketing." Alaska, American, British Airways, Delta, Continental, Lufthansa, Northwest, US Air and United have agreements with points.com. Priceline.com, Obitz and Travelocity have agreements with Alaska, American, Delta, Continental, Lufthansa, Northwest, US Air and United. Hotwire has agreements with Alaska, Delta, Continental, Lufthansa, Northwest, US Air and United. Other agreements exist.

38. American seeks to prevent companies from using its fares and schedules made available to travel agents through global distribution systems to make lower fares available to consumers. American sued to prevent companies from using an airline's fares and schedules made available to travel agents

through global distribution systems from making the lower fares available to consumers.

39. Passengers seeking less expensive airline tickets and frequent flyer miles owners hoping to sell their miles often seek to do so through the Internet. American has brought this suit to prevent this competition.

40. American takes steps to eliminate competition by preventing actual and potential competitors from taking advantage of the Internet. American's suit against Google to eliminate this form of competition was recently dismissed with prejudice.

41. Consumers of airline tickets often seek the lowest available priced tickets on flights that best meet their needs. American seek to eliminate competitors who purport to offer lower prices than American.

42. The result of American's actions and those of American's competitors is the reduction of competition and the maintenance, stabilization and fixing of the prices of airline tickets.

ACTIONS AGAINST AADVANTAGE MEMBERS

43. Tickets purchased with frequent flyer miles transferred outside the means authorized and controlled by American are subject to cancellation by American and the parties seeking to buy and sell lower priced tickets are subject to penalties.

44. American contacts frequent flyer mile members it suspects may have conveyed, by sale or

barter, their frequent flyer miles, and threatens and imposes retribution against these persons such as cancelling issued tickets and cancelling frequent flyer miles and with other penalties if they do convey the miles through persons or processes not controlled and/or authorized by the airline.

45. American contacts persons it believes have sold or transferred frequent flyer miles and through threats and penalties forces that these persons provide information related to their alleged wrongs.

46. American refuses to honor tickets it believes were acquired with purchased or bartered frequent flyer miles or through unapproved ticketing practices, and require the passengers to pay full fares if they wish to fly to their chosen destination.

CO-CONSPIRATORS

47. American has conspired with various persons to commit the described wrongful actions against airline passengers, Frequent Flyer Depot and other engaged in the sale of airline tickets and to asset such persons in similar actions.

48. American has entered into illegal agreements with competitors to fix prices, to restrict the use of frequent flyer miles and to eliminate "abusive ticketing," all in violation of the Texas Free Enterprise Act of 1983.

49. The Frequent Flyer Depot parties do not know the names of all of the conspirators, but allege, based on information and belief, that the following persons are conspirators: Alaska Airlines, Continental

Airlines, Delta Air Lines, Northwest Airlines, United Airlines, US Airways and American Eagle Airlines.

50. Other persons are either co-conspirators or are one of the means by which the conspiracy is effectuated including Airlines Reporting Corporation and Airline Tariff Publishing Company.

51. Generally, American's willing and unwilling co-conspirators include:

a. entities and persons which sell airline tickets;

b. domestic and foreign carriers who participate in alliances, code-sharing agreements and other agreements with the named airlines;

c. various entities and trade groups owned, controlled or utilized by the named airlines; and

d. airlines which operate under brand names of the named airlines which feed passengers to and receive passengers from the named airlines.

CAUSES OF ACTION

Interference with Contractual and Business Relations

52. The above described actions taken by American wrongfully interfered with Frequent Flyer Depot's relationships with existing customers and prevented Frequent Flyer Depot from obtaining additional customers.

53. American acted and continues to act with a willful desire and intent to hinder and interfere with, and continues to interfere with Frequent Flyer Depot's contracts with persons who seek to sell and purchase AAdvantage frequent flyer miles by making the exercising of those persons rights more difficult, by threatening Frequent Flyer Depot's customers, and by seeking to eliminate Frequent Flyer Depot's means of obtaining business from persons seeking to sell and purchase AAdvantage frequent flyer miles.

54. As a proximate result of American's tortious interference, Frequent Flyer Depot has suffered injury and damages, including being deprived of being able to conduct free and open business with owners of American's frequent flyer miles.

55. In addition, Frequent Flyer Depot has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by American. In the absence of an injunction, American is likely to attempt to interfere with Frequent Flyer Depot's right to conduct business with AAdvantage members. Accordingly, Frequent Flyer Depot is entitled to injunctive relief.

Tortious Interference with Prospective Relations

56. But for American's wrongful actions, holders of American's frequent flyer miles would have sought to sell or barter their frequent flyer miles through Frequent Flyer Depot.

57. American wrongfully interfered with Frequent Flyer Depot's reasonable expectations of being able

to do business with holders of American's frequent flyer miles.

58. American's actions were independently tortious in that the actions were taken in the course of an illegal restraint of trade under Texas Free Enterprise Act of 1983.

59. American's tortious interference proximately caused Frequent Flyer Depot damages in that, absent American's wrongful actions, additional holders of American's frequent flyer miles would have done business with Frequent Flyer Depot.

60. In addition, Frequent Flyer Depot has suffered and will continue to suffer irreparable harm, and its remedy at law is not itself adequate to compensate for injuries inflicted by American. In the absence of an injunction, American is likely to continue to attempt to interfere with Frequent Flyer Depot's business relations with holders of American's frequent flyer miles. Frequent Flyer Depot is entitled to injunctive relief.

Declaratory Judgment

61. Frequent Flyer Depot and Robert Pirkle seek a declaratory judgment stating that American:

a. American does not have contracts with AAdvantage members;

b. AAdvantage members are not legally barred from selling or bartering their American frequent flyer miles;

c. AAdvantage frequent flyer program members and others are not legally barred from purchasing or bartering their American frequent flyer miles;

d. Third persons are not barred from engaging in the purchase, sale and barter of AAdvantage frequent flyer miles;

e. The provisions in the AAdvantage terms and conditions allowing American to take unilateral action against AAdvantage members are illegal and unenforceable penalties; and

f. American's restrictions against "abusive ticketing" are illegal and against public policy and are unenforceable.

Violations of the Texas Free Enterprise Act of 1983

62. American has acquired or has attempted to acquire monopoly power over the means by which consumers may exercise their rights in American's frequent flyer miles and over the prices of tickets sold for flights on American, and has engaged in predatory, discriminatory and anticompetitive activity to obtain, create, maintain and enforce its monopoly power.

63. American has conspired to monopolize the means by which members may exercise their right in American's frequent flyer miles and over the prices paid for American's tickets. American has engaged in predatory, discriminatory and anticompetitive

activity to obtain, create, maintain and enforce its monopoly power.

64. American and others in competition with American, willfully and flagrantly, have conspired to take steps with the purpose and effect of (a) fixing the prices of airline tickets, and (b) fixing and controlling the use of American's frequent flyer miles.

65. American's actions violate the provisions of §15.05(a) and (b) of the Texas Business & Commerce Code.

66. American's conduct is willful or flagrant.

Violations of Texas Deceptive Trade Practices Act

67. The above described representations made by American to AAdvantage members and Robert Pirkle violated the Texas Deceptive Trade Practices Act in that American represents that its frequent flyer program has characteristics, uses, benefits, or quantities which it does not have, and American's frequent flyer program offers benefits and rights to members and has obligations and duties on members and American that are of a particular standard, quality, or grade, or that goods are of a particular style or model, when they are of another.

68. American filed suit against Robert on a claim based on Robert's membership in the AAdvantage Frequent Flyer Program in this county rather than the county of Robert's resident in violation of the Texas Deceptive Trade Practices Act.

69. The foregoing violate Section 17.46 of the Deceptive Trade Practices - Consumer Protection Act.

70. Robert relied upon American's misrepresentations in doing business with American.

71. American's conduct with regard to American's AAdvantage Frequent Flyer Program is unconscionable as American represents to actual and prospective members of the Frequent Flyer Program that they are bound to act in ways demanded by American to their financial detriment when, in fact, they are not bound.

72. American has further sued Robert for alleged violations of his supposed obligations to American under the AAdvantage Frequent Flyer Program and for allegedly participating in others' alleged violations of his supposed obligations when, in fact, no such obligations exist as is known by American.

73. By such conduct, American took advantage of the lack of knowledge, ability, experience or capacity of Robert and other members of the AAdvantage Frequent Flyer Program, to Robert's detriment and damage, to a grossly unfair degree.

74. American's actions as described in this Counterclaim and in its Third Amended Petition are fraudulent.

75. Frequent flyer miles as treated by American have little or no value and that value is subject to unilateral elimination by American at any time it pleases.

76. As a result, the consideration paid for such frequent flyer miles, either by flying on American and paying a price that included the cost of the frequent flyer mile as determined by American or using a particular vendor, who included in its price the cost the vendor paid to American was fraudulently obtained by American.

Damages

72.[sic]Frequent Flyer Depot seeks to recover its actual damages of not less than $200,000, plus prejudgment and postjudgment interest as allowed by law.

73. Robert seeks to recover his damages of not less than $5,000.

74. Frequent Flyer Depot seeks to recover interest as allowed by § 15.21(a) of the Texas Business & Commerce Code.

75. Under the provisions of §15.21(a) of the Texas Business & Commerce Code, Frequent Flyer Depot seeks to recover treble its actual damages.

Injunctive Relief

76. Frequent Flyer Depot seek an injunction against American prohibiting (a) future violations of §15.05(a) and (b) future violations of the Texas Business & Commerce Code, (b) § 15.05 (b) of the Texas Business & Commerce Code, (c) actual or attempted enforcement of its AAdvantage terms and conditions prohibiting the barter and sale of frequent

flyer miles, and (d) actual or attempted enforcement of its rules against "abusive ticketing."

77. Frequent Flyer Depot and Robert Pirkle seek an injunction against American prohibiting the enforcement of the following provisions in the AAdvantage terms and conditions:

> a. At no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration. Violators (including any passenger who uses a purchased or bartered award ticket) may be liable for damages and litigation costs, including American Airlines attorneys fees incurred in enforcing this rule.
>
> b. Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding. If a trip has been started, any continued travel will be at the passenger's expense on a full-fare basis. The passenger and member may also be liable to American Airlines for the cost of a full fare ticket for any segments flown on a sold or bartered ticket.
>
> c. Fraud, misrepresentation, abuse or violation of applicable rules (including, but not limited to, American or American Eagle conditions of carriage, tariffs and AAdvantage program rules) is subject to appropriate administrative and/or legal action by appropriate governmental authorities and American

Airlines. Such action may include, without limitation, the forfeiture of all award tickets, and any accrued mileage in a member's account, as well as cancellation of the account and the member's future participation in the AAdvantage program. In addition, American Airlines reserves the right to take appropriate legal action to recover damages, including its attorney fees incurred in prosecuting any lawsuit.

d. American Airlines reserves the right to audit any and all accounts at any time and without notice to the member to ensure compliance with AAdvantage program rules and applicable conditions of carriage and/or tariffs. In the event that an audit reveals discrepancies or violations, the processing of AAdvantage awards, mileage accrual and summaries may be delayed until the discrepancies or violations are resolved satisfactorily to American Airlines. Pending such resolution, members may be prohibited from redeeming mileage credits for an AAdvantage award or ticket as determined in American's sole discretion.

78. Frequent Flyer Depot seeks an injunction against American prohibiting the enforcement of the following provisions in the Conditions of Carriage:

Unless a ticket is reissued by American or its authorized agent upon payment of applicable charges, or an authorized representative of American waives applicable restrictions in writing, a ticket is invalid:

1. If used for travel to a destination other than that specified on the ticket,

2. If the passenger fails to comply with applicable stay-over requirements,

3. If the passenger does not meet the purpose or status requirement associated with the fare category on the ticket, or

4. If American determines that the ticket has been purchased or used in a manner designed to circumvent applicable fare rules.

American specifically prohibits the practices commonly known as:

Back to Back Ticketing: The combination of two or more roundtrip excursion fares end to end for the purpose of circumventing minimum stay requirements.

Throwaway Ticketing: The usage of roundtrip excursion fare for one-way travel, and Hidden City/Point Beyond Ticketing: Purchase of a fare from a point before the passenger's actual origin or to a point beyond the passenger's actual destination.

Where a ticket is invalidated as the result of the passenger's non-compliance with any term or condition of sale, American has the right in its sole discretion to:

1. Cancel any remaining portion of the passenger's itinerary,

2. Confiscate unused flight coupons,

3. Refuse to board the passenger or check the passenger's luggage, or

4. Assess the passenger for the reasonable remaining value of the ticket, which shall be no less than the difference between the fare actually paid and the lowest fare applicable to the passenger's actual itinerary

Relief Unique to Robert Pirkle

79. American's conduct as described above was a producing cause of Pirkle's economic damages. As a result, Pirkle sustained damages in that Pirkle's AAdvantage frequent flyer miles are less valuable than they would have been had American not attempted to impose its restrictions upon Pirkle and other holders of AAdvantage frequent flyer miles, and Pirkle has been required to retain an attorney to represent him in this matter. Due to the continuing nature of this litigation, Pirkle's damages continue to accrue, but his damages with regard to his frequent flyer miles is at least $3,000.

80. Pursuant to §17 .506, TEX. BUS. & COMM. CODE, Robert seeks to recover his attorney's fees which are estimated to be $50,000.

81. American's conduct as described in this Counterclaim was committed knowingly. American is a major publicly traded corporation with a legal department. American was actually aware, at the time of the conduct, of the falsity, deception, and

unfairness of the conduct about which Robert complains.

82. As a direct result of American's knowing misconduct, Robert has suffered mental anguish. In particular, Robert suffered mental anguish damages from having been sued by American to enforce rights that do not exist and to recover damages from Robert for breaches of American's rights which do not exist, from being accused of having committed fraud and of having engaged in illegal actions, which are untrue and false, and accompanying panic attacks, and loss of sleep and appetite, all of which commenced on the date that Robert became aware of the lawsuit and the fact that he has been named a defendant in this lawsuit. Accordingly, American is liable to Robert for mental anguish damages suffered by Robert.

83. Robert seeks additional damages of up to three times the amount of economic damages as permitted by the Deceptive Trade Practices-Consumer Protection Act as American's actions were committed knowingly. That is, American had actual awareness of the falsity, deception, or unfairness of the acts or practices.

Attorney's Fees

84. Pursuant to the Texas Declaratory Judgment Act and the Texas Free Enterprise Act of 1983, Frequent Flyer Depot, George and Robert seek to recover their attorney's fees. Such fees are estimated to be at least $250,000.

WHEREFORE, Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that American Airlines

take nothing on its claims against Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle and that upon final hearing Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle recover from American Airlines, Inc. the above described relief and such other and further relief as to which they may show themselves to be justly entitled.

Respectfully submitted,
BENNETT, WESTON & LaJONE, P.C.

/s/ J. Michael Weston

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[Certification of service omitted]

FREQUENT FLYER DEFENDANT'S SECOND AMENDED ANSWER

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC., et. al.

IN THE DISTRICT COURT
67TH JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

SECOND AMENDED ANSWER

Defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("FFD defendants") file their Second Amended Answer as follows:

GENERAL DENIAL

1. FFD defendants deny each and every allegation contained in plaintiffs Second Amended Petition and demand strict proof thereof.

AFFIRMATIVE DEFENSES

2. FFD defendants affirmatively plead that plaintiff's claims for equitable relief are barred by laches.

3. FFD defendants affirmatively plead that plaintiff's claims for equitable relief are barred by the doctrine of unclean hands.

4. FFD defendants affirmatively plead that the plaintiff's claims are barred by the applicable statutes of limitations.

5. FFD defendants affirmatively plead that plaintiff's claims are barred as illegal restraints on alienation.

6. FFD defendants affirmatively plead that plaintiff's claims are barred as illegal restraints on trade.

7. FFD defendants affirmatively plead that plaintiff's claims are barred by illegality for violations of the Texas Free Enterprise & Antitrust Act and Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1-2.

8. FFD defendants plead that American airlines has no contract with the members of the AAdvantage frequent flyer program.

9. American's claims against the FFD defendants are pre-empted pursuant to 49 U.S.C. §41713 as being related to the prices, routes, or services of an air carrier, American.

WHEREFORE, defendants Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle pray that upon final hearing that the plaintiff take nothing, that all costs be taxed against the plaintiff

and for such other and further relief as to which they may show themselves to be justly entitled .

Respectfully submitted,
Bennett, Weston, & LaJone, P.C.
/s/ J. Michael Weston
J. Michael Weston
State Bar No. 21232100
1750 Valley View Lane, Suite 120
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[Certificate of service omitted]

REPORT'S RECORD

VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 067-224132-07

IN THE DISTRICT COURT
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

AMERICAN AIRLINES, INC.

PLAINTIFF,

VS.

JOHN DOE

DEFENDANTS.

HEARING

On the 16th day of September, 2008, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Don Cosby, Judge presiding, held in Fort Worth, Tarrant County, Texas:
Proceedings reported by machine shorthand.

[PAGES OMITTED]

[FROM PAGES 35]

Q. You have brokered hundreds of AAdvantage tickets since 2006; is that correct?
A. Yes.

Q. Of the AAdvantage tickets that you sell, 99.9 percent are for international first class or business class travel?
A. That's close, yes.
Q. Okay. You sell V as AAdvantage tickets for discounts of about 70 percent off of American's fares?
A. Between 50 to 70 percent.
Q. And you personally set the price for the AAdvantage award tickets that you sell?
A. Yes.

[FROM PAGES 42-43]

Q. (BY MS. ROTMAN) Walking through a transaction, you get customers through your Web site who want to purchase airline tickets; is that correct?
A. Yes.
Q. And those customers tell you about a particular itinerary they want to fly?
A. They give us where they want to fly to. Most of them do not give us an itinerary, meaning, a specific airline and the flight and time. Some do, but the majority of them don't.
Q. Okay. So then your work is to find a particular airline that will take them to their desired destination?
A. We do the grunt work, yes.
Q. Okay. And once you determine that there's an airline that would have an available itinerary, you are figuring out whether that airline offers an award ticket for that itinerary, right?
A. Yes.
Q. You only deal with award tickets?

A. When you say tickets, we deal with award or frequent flyer miles. There are awards that we do not deal with. It's only the miles.
Q. Okay. What are the awards that you don't deal with?
A. Anything that has an award attached to it. We only -- we only broker frequent flyer miles. If you have an upgrade or if you have a special going on which is an award, we don't do anything with those at all.
Q. Okay. So as it relates to American Airlines, you only deal with AAdvantage award tickets?
A. Yes.
Q. Okay. And if you determine that the itinerary is available from an AAdvantage award ticket, then you will, as a next step, find someone from whom you can purchase the AAdvantage miles to obtain the award ticket; is that correct?
A. Well, you don't purchase anything. We broker the deal between the buyer and the seller. We do the grunt work. We actually make the reservation, which is the hardest thing to do. We don't purchase anything.

[FROM PAGE 102]

Q. And once these mileage credits are made by American, who actually owns those -- those mileage credits?
A. American Airlines retains ownership of the miles.
Q. And what are the AAdvantage members then permitted to do with those earned miles?
A. AAdvantage members are permitted to use the miles to redeem them for travel on American Airlines and our various partners. They're eligible to redeem

them for other goods and services that may be offered from time to time by our various partners.
Q. And those particular benefits are made available to the AAdvantage members through some documentation or through the Web site or how do they find out what --
A. Primarily, through the Web site, AA.com. There's a section on the Web site where customers can learn about the various ways to earn and use AAdvantage miles.

[FROM PAGES 116 – 118]

MR. WESTON: Let's mark this as Defendant's Exhibit No. 2.
Q. (BY MR. WESTON) Do you recognize that document, sir?
A. Yes, sir.
Q. What is that document?
A. This is a list of AAdvantage participants as it
Q. Would these be the AAdvantage partners that we were talking about?
A. Yes, sir.
Q. Is this a complete list?
A. I do not know that.
Q. Okay. And on the first page there is a listing of airlines that are AAdvantage partners. Do you see that?
A. Just the first page or first page and second page?
Q. First and second. Thank you.
A. Yes, sir.
Q. So, if I understand, what you're saying is that specifically on these airlines, these are airlines that a passenger flying on can get American Airlines AAdvantage miles issued to them; is that correct?

A. Yes, sir.
Q. Okay. And these are also airlines that people could -- passengers can use AAdvantage miles to fly on these airlines; is that not correct?
A. With some restrictions, yes, sir.
Q. Okay. So there would be an agreement between American Airlines and these airline partners that are shown on Defendant's Exhibit No. 2?
A. Yes, sir.
Q. And that would set out the parameters of the agreements between American Airlines and these other airlines?
A. That's right.
Q. And included in the agreement between American Airlines and these partner agreements would be restrictions on the use of American Airlines frequent flyer miles, specifically, that they cannot be purchased, sold or bartered; is that not correct?
A. I can't -- I do not know the answer to that.
Q. Okay. To your knowledge, can a British Airways, for example, engage in the purchase, sale or barter of American Airlines frequent flyer miles?
A. Can British Airways the entity?
Q. Yes.
A. British Airways does purchase AAdvantage miles from AAdvantage, yes.
Q. But can they do it for a customer? Can a customer call up and say I want to trade my frequent flyer miles, American Airlines, with another person and fly on British Airways. Can British Airways do that?
A. No. If I understand your question, no, they cannot.
Q. Can any of the airlines do it?
A. No, sir.

Q. They all have agreements with American Airlines that they won't do that; isn't that the fact?
A. Well, no, I can't testify to that.
Q. You don't know if they have -- the form of their agreement but --
A. That's correct.
Q. -- you know they cannot do it?
A. Right.
Q. Do you know what percentage of American Airlines AAdvantage miles are earned by people flying on American Airlines?
A. I do not know the exact percentage, but the vast majority would be accrued by travel on American Airlines.
Q. Isn't it, in fact, that about half the American Airlines miles issued are sold by American Airlines to partners?
A. I do not know what the exact percentage is.

[FROM PAGES 122-124]

Q. (BY MR. WESTON) Mr. Balsam, will you look at the -- one, two, three, four -- fifth page of exhibit -- Defendant's Exhibit No. 3.
A. Yes.
Q. Where it says you can buy purchase points for yourself or someone else?
A. Yes.
Q. Okay. And it lists a number of airlines that you can do this with, does it not?
A. Yes, it does.
Q. Alaska Airlines, American Airlines, Delta SkyMiles, Frontier Airlines, Icelandair Airlines, JetBlue TrueBlue -- excuse me -- Lufthansa, Midwest, Northwest and Virgin Atlantic. Do you see that?

A. Yes, I do, among others.
Q. So through points.com, people can share their airline miles with all those airlines; is that not a fact? That's what it says. That's what the document says.
A. Well, no, sir. I disagree with that. That's not what this document says.
Q. It says you can buy them.
A. May I read the pertinent part?
Q. Feel free.
A. The top of the first page that you referenced, it says buy purchase points or miles for yourself or someone else. It does not mention sharing across programs.
Q. Fine. Let's look at the seventh -- I believe it's the seventh page of the same document. Do you see that document?
A. Yes, I do.
Q. Where it says share your points or miles?
A. Yes.
Q. And it lists a number of airlines, doesn't it?
A. Yes, it does.
Q. Alaska Airlines, American Airlines, Delta Airlines, Frontier Airlines, U.S. Airlines, Icelandair Airlines. Do you agree?
A. Yes, among others, including the hotel program.
Q. Yes.
A. Two hotel programs.
Q. To your knowledge, does American Airlines have a contract permitting points.com to do this?
A. To my knowledge, yes.
Q. Have you ever seen the contract?
A. No.

Q. Now, you know that American Airlines has an agreement with regard to frequent flyer miles with Alaska Airlines, do you not?
A. I'm aware that we have the ability for customers to earn miles on Alaska Airlines.

[REMAINDER OF PAGE 124 OMITTED]

[PLAINTIFF'S TEMPORARY INJUNCTION EXHIBIT NO. 1, PAGE 1]

[EXCERPS FROM ORIGINAL EXHIBIT] FROM FREQUENT FLYER DEPOT'S WEBSITE

[GRAPHICS AND LINKS OMITTED]

"Welcome to Frequent Flyer Depot. We are the premiere online brokerage of frequent flyer tickets and mileage rewards. Frequent Flyer Depot specializes in international, first class and business class travel. Our brokerage offers you speedy, professional service and cheap discount airline tickets to any destination in the world. We have 14 years of experience in providing the best bargains in business class and first class airfares. Learn more about who we are and find out about what we do." [Links and emphasis omitted].

[FROM PAGE 5]

"Starting in Dallas, Texas, Frequent Flyer Depot has been in business since 1992. Frequent Flyer Depot provides professional brokerage of all frequent flyer miles and mileage rewards worldwide. Frequent Flyer Depot is the online identity of Last Minute Travel, which is owned and operated by George Pirkle. Frequent Flyer Depot guarantees that you will save money on your first class and business class airfares. If you are looking for a secure site, quality and speedy service, then trade online with us."

[FROM PAGE 7]

"Frequent Flyer Depot provides a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades. Frequent Flyer Depot provides business and first class travel, both domestic and international, with savings up to 70% off on your airline tickets. To maintain the finest service and the highest rate of return, we have a hassle-free cash-In/cash-out process. This policy guarantees our clients quick and secure transactions. Frequent Flyer Depot is not affiliated with any airline, banking Institution, credit card company or their respective frequent flyer or air award programs. Frequent Flyer Depot's use of names related to these companies or programs does not constitute an infringement on their trademarks or an attempt to profit from their trademarks. Frequent Flyer Depot's intent is to educate its clients of the various programs that offer frequent flyer incentives so that they make informed decisions when trading in their travel awards."

[FROM PAGE 9]

"Frequent Flyer Depot provides a secure service that allows travelers to buy and sell all frequent flyer tickets, mileage rewards, and upgrades. Frequent Flyer Depot provides business and first class travel, both domestic and international, with savings up to 70% off on your airline tickets. To maintain the finest service and the highest rate of return, we have a hassle-free cash-in/cash-out process. This policy guarantees our clients quick and secure transactions.

To purchase miles buyers must firs t call, email, or fax the type and amount of miles, including their contact information. Frequent Flyer Depot will then

contact the buyer for verification within two (2) business hours.

When a seller is matched to the buyer's request, Frequent Flyer Depot verifies if the buyer wishes to proceed with the transaction. Upon receiving confirmation, Frequent Flyer Depot will initiate the process which transfers funds and places the ticket(s) in the buyer's name. To learn more about this transaction, please visit the appropriate section under How to Buy & Sell.

Buyers pay the cost of the ticket(s) and all fees including international airport taxes, expedite and security fees, if any. (Note: Frequent Flyer Depot's broker fee is already included In the price of the ticket.) International airport taxes may range in price from $30 to $120, depending on destination and how many legs you fly. Expedite fees may cost up to $75, and security taxes may cost $5 per leg. For current prices, please see our price list."

[FROM PAGE 11]

"Frequent Flyer Depot aims to deliver the best-rates and the finest service to our clients. We strive to provide our clients with the most competitive rates found online. We also provide up-front pricing on our brokerage fees. See our pricing chart for details.

To sell miles, sellers may call, email or fax Frequent Flyer Depot and supply their contact information, the type and amount of miles they wish to self. Frequent Flyer Depot will then contact the seller for verification purposes within two (2) business hours.

Once a seller is matched with a prospective buyer, Frequent Flyer Depot will confirm that the buyer and seller still wish to proceed, then process the funds and tickets transfer. For more information about this process, please view the appropriate section under How to Buy & Sell.
Sellers earn the following: 1.8 cents per mile on AA, 2.0 cents per mile on BA; 1.4 cents per mile on Continental and Northwest, and 1.6 cents per mile (minimum of 90,000 miles) for all other carriers. Sellers are also reimbursed for all out-of-pocket expenses, international airport taxes range in price from $30 to $120, depending on destination and how many legs you fly. Expedite fees may cost up to $75, and security taxes may cost $5 per leg. For current prices, please see our price list.

[FROM PAGE 13]

"Although airline policy discourages buying or selling miles, it is NOT against the law for you to buy or sell frequent flyer awards. We will be happy to address any questions or concerns you may have.

To save yourself time and money, plan your itinerary and shop before you buy.

We broker the transfer of miles in most frequent flyer programs. However, because each program is different, we encourage you to review your award policy. Please browse our Eligibility section for a listing of award programs."

[PLAINTIFF'S TEMPORARY INJUNCTION EXHIBIT NO. 3, PAGE 1]

[EXCERPS FROM ORIGINAL EXHIBIT]

FROM AMERICAN AIRLINE'S WEBSITE

[GRAPHICS AND LINKS OMITTED]

AADVANTAGE TERMS & CONDITIONS

"Earning AAdvantage Miles

To ensure you receive credit for your AAdvantage transactions, please provide your AAdvantage number when you make your travel reservations or use the services of our participants. Retain all flight documents until the mileage credit appears on your mileage summary. Members may track their summary online at www.aa.com or by subscribing to receive the AAdvantage eSummary. For transactions with other participants, retain your original paid invoice. AAdvantage eSummary subscribers receive their summary and information every month, regardless of activity level. Your summary includes f light and participant mileage earned, along with newsletters and special promotions.

- AAdvantage members must have mileage earning or redeeming activity once every 18 months in order to retain their miles. Miles will first expire under this 18-month policy on December 15, 2007. If your account has no qualifying activity in any 18-month period, all miles in the account will expire except for those miles earned prior to July 1, 1989 in accounts established prior lo January 1, 1989 whose mileage credit will not expire. Each

qualifying activity extends the expiration date of all unexpired mileage credit in your account for 18 months from the date of the qualifying activity. Qualifying activity is defined as redeeming any AAdvantage award or accruing mileage credit on any eligible American, American Eagle, AmericanConnection or AAdvantage airline participant as well as accruing mileage credit with participating hotels, car rental companies, credit cards, telecommunication providers, and other service providers offering AAdvantage mileage credit.

- Mileage will be credited only to the account of the AAdvantage member who flies, rents a car, stays at a hotel or earns mileage utilizing other participating companies. No mileage credit will be awarded for canceled flights or if you are accommodated on another airline.
- Except as otherwise explained below, mileage credit is not transferable and may not be combined among AAdvantage members, their estates, successors and assigns. Accrued mileage credit and award tickets do not constitute property of the member. Neither accrued mileage, nor award tickets are transferable b y the member (i) upon death , (ii) as part of a domestic relations matter, or (iii) otherwise by operation of law. However, American Airlines, in its sole discretion, may
- credit accrued mileage to persons specifically identified in court approved divorce decrees and wills upon receipt of documentation satisfactory to American Airlines and upon payment of any applicable fees. Mileage credit is transferable between AAdvantage accounts

when offered by AA online, with the shareAAmiles program. The member must adhere to the rules and limitations of the shareAAmiles program.

- AAdvantage flight mileage credit is determined on the basis of nonstop distances between the airports where your flight originates and terminates. On connecting flights, you'll receive mileage credit for each segment of your trip; on single-plane flights, you'll receive the nonstop origin-destination mileage, except on TAM. On American Airlines and other AAdvantage airline participants, you'll receive AAdvantage mileage credit only for the class of service on which your fare is based when you are ticketed. American Airlines is the final authority on qualification for mileage credit and reserves the right to deny or revoke mileage credit at any time if American Airlines determines that mileage credit was improperly given.
- Mileage credit cannot be earned for the same flight, hotel stay t, or car rental in more than one of the following programs: the AAdvantage program or any other loyalty program in which American Airlines participates.
- After your f light departs, you will not be able to change your selection of a frequent traveler program for earning mileage credit.
- You will not be able t o transfer mileage you accumulate in the AAdvantage program to any other carrier's program, nor can you transfer mileage you accumulate in another carrier's program to the AAdvantage program.

- You may accrue mileage only for purchased, eligible, published-fare tickets on qualifying routes used in accordance with all applicable conditions of carriage, tariffs, rules and terms of ticketing and travel. AAdvantage mileage accrual eligibility on airline participant routes is subject to change without notice.
- Mileage can only be accumulated one time per flight, regardless of the number of seats purchased.
- Only individual persons are eligible for AAdvantage program membership. Corporations, other entities, animals or blocked-seat baggage are not eligible to become AAdvantage members or to accrue AAdvantage miles. Generally, only the member named on the account will be entitled to access account information. However, American Airlines does comply with court orders and subpoenas and cooperates with investigations by state and federal agencies. Under these circumstances your account information may be shared with others with or without your knowledge or consent.

[REMAINDER OF SUB-HEADING OMITTED]

AAdvantage Award Conditions

To ensure you receive credit for your AAdvantage transactions , please provide your AAdvantage number when you make your travel reservations or use the services of our partners American Airlines may , in its discretion , change the AAdvantage program rules, regulations, travel awards, and special offers at any time with or without not ice . This means that the

accumulation of mileage credit does not entitle members to any vested rights with respect to such mileage credits, awards or program benefits. In accumulating mileage or awards, members may not rely upon the continued availability of any award or award level, and members may not be able to obtain all offered awards for all destinations or on all flights. Any award may be withdrawn or subject to increased mileage requirements or new restrictions at any time. American Airlines may, among other things, (i) withdraw, limit, modify, or cancel any award; (ii) change program benefits, mileage levels, participant affiliations, conditions of participation, rules for earning, redeeming, retaining or forfeiting mileage credit, or rules for the use of travel awards; or (iii) add travel embargo dates, limit the number of seats available for award travel (including , but not limited to, allocating no seats on certain flights) or otherwise restrict the continued availability of travel awards or special offers. American Airlines may make anyone or more of these changes at any time even though such changes may affect your ability to use the mileage credit or awards that you have already accumulated. American Airlines reserves the right to end the AAdvantage program with six months notice. AAdvantage travel awards, accrued mileage credits and special offers are subject to government regulations. American Airlines is not responsible for products and services offered by other participating companies. Any departure fee, immigration fee, security fee, tax liability surcharge, passenger facility charge

or any other fee or surcharge (whether enacted by a governmental
authority or otherwise) is the responsibility of the passenger and/or the AAdvantage member.
["FLIGHT AWARDS" SUB-HEADING OMITTED]

General AAdvantage Conditions

- At no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration. Violators (including any passenger who uses a purchased or bartered award ticket) may be liable for damages and litigation costs, including American Airlines attorneys fees incurred in enforcing this rule.
- Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding. If a trip has been started, any continued travel will be at the passenger's expense on a full-fare basis. The passenger and member may also be liable to American Airlines for the cost of a full fare ticket for any segments flown on a sold or bartered ticket.
- Fraud, misrepresentation, abuse or violation of applicable rules (including, but not limited to, American or American Eagle conditions of carriage, tariffs and AAdvantage program rules) is subject to appropriate administrative and/or legal action by appropriate governmental

authorities and American Airlines. Such action may include, without limitation, the forfeiture of all award tickets, and any accrued mileage in a member's account, as well as cancellation of the account and the member's future participation in the AAdvantage program. In addition, American Airlines reserves the right to take appropriate legal action to recover damages, including its attorney fees incurred in prosecuting any lawsuit.

- American Airlines reserves the right to audit any and all accounts at any time and without notice to the member to ensure compliance with AAdvantage program rules and applicable conditions of carriage and/or tariffs. In the event that an audit reveals discrepancies or violations, the processing of AAdvantage awards, mileage accrual and summaries may be delayed until the discrepancies or violations are resolved satisfactorily to American Airlines. Pending such resolution, members may be prohibited from redeeming mileage credits for an AAdvantage award or ticket as determined in American's sole discretion.
- If American Airlines and/or any AAdvantage participant improperly denies a member mileage credit, travel award, or some other benefit, the member' s exclusive remedy shall be the issuance of the improperly denied credit, award or benefit if available, or such other alternative comparable benefit as determined by American , which shall have no additional

liability whatsoever. In no event shall American Airlines or any AAdvantage participant be liable to any member, or anyone claiming through a member, for any direct, indirect or consequential damages, or lost revenue or profits, arising out of American Airlines or any AAdvantage participant acts or omissions in connection with the AAdvantage program.

[REMAINDER OF DOCUMENT OMITTED]

- [DEFENDANT'S EXHIBIT NO. 6]

AMR CORPORATION FORM 10-k

Frequent Flyer Program

American established the AAdvantage frequent flyer program (AAdvantage) to develop passenger loyalty by offering awards to travelers for their continued patronage. The Company believes that the AAdvantage program is one of its competitive strengths. AAdvantage benefits from a growing base of approximately, sixty million members with desirable demographics who have demonstrated a strong willingness to collect AAdvantage miles over other loyalty program incentives and are generally disposed to adjusting their purchasing behavior in order to earn additional AAdvantage miles. AAdvantage members earn mileage credits by flying on American, American Eagle, and the American Connection carriers or by using services of other participants in the AAdvantage program. Mileage credits can be redeemed for free, discounted or upgraded travel on American, American Eagle or other participating airlines, or for other awards. Once a member accrues sufficient mileage for an award, the member may book award travel. Most travel awards are subject to capacity controlled seating . A member's mileage credit does not expire provided that member has any type of qualifying activity at least once every 18 months.

American sells mileage credits and related services to other participants in the AAdvantage program. There are over 1,000 program participants, including a leading credit card issuer, hotels, car rental companies and other products and services

companies in the AAdvantage program. The Company believes that program participants benefit from the sustained purchasing behavior of AAdvantage members, which translates into a recurring stream of revenues for AAdvantage. Under its agreements with AAdvantage members and program participants, the Company reserves the right to change the AAdvantage program at any time without notice, and may end the program with six months notice. As of December 31, 2007, AAdvantage had approximately 60 million total members, and 613 billion outstanding award miles. During 2007, AAdvantage issued approximately 200 billion miles, of which approximately one-half were sold to program participants. See Critical Accounting Policies and Estimates under Item 7 for more information on AAdvantage.

[REMAINDER OF REPORTER'S RECORD OMITTED]

Supreme Court, U.S.
FILED
JAN 2 8 2010
OFFICE OF THE CLERK

NO. 09-815

IN THE

SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

VS.

AMERICAN AIRLINES, INC.

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals,
Second District Of Texas, Fort Worth

BRIEF FOR RESPONDENT IN SUPPORT OF PETITION FOR WRIT

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CORPORATE DISCLOSURE STATEMENT

Main St. Travel Center of Monsey, Inc. does not have a parent corporation, nor does any company own more than 10% of its stock. Main St. is not a publicly traded company.

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.6, Main St. Travel Center of Monsey, Inc., a defendant and counterplaintiff in the court below, respectfully submits this response in support of the petition for writ of certiorari filed by Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle (hereafter collectively "Frequent Flyer Depot"), in *Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle v. American Airlines, Inc.,* No. 09-815. Frequent Flyer Depot seeks review of the decision of the Texas Supreme Court which affirmed a lower court ruling that only claims made against air carriers are preempted by 49 U.S.C. § 41713. This response is being submitted within 20 days of Frequent Flyer Depot's petition having been docketed on January 8, 2010.

STATEMENT

As explained in more detail in the Petition, this matter involves a challenge by an airline to the scope of the preemptive provisions of the Airline Deregulation Act (ADA, or as sometimes referred to herein, "The Act.") For the reasons stated herein, the Petition presents an opportunity for this Court to clarify the scope of preemption under the ADA by

clarifying 1) whether preemption is determined by the identity of the litigants, or the subject matter of the claims; 2) to provide much needed guidance to the lower courts in articulating a test for determining when a state claim significantly impacts rates, routes, and services of an airline such that same is preempted, but is not too tenuous or remote as to avoid preemption; and 3) to determine whether the comprehensive administrative remedies promulgated by Congress providing air carriers' ability to bring administrative complaints against ticket agents indicates that Congress intended to preempt matters within the scope of available administrative remedies.

American Airlines (American) brought various state law claims against a variety of defendants, including appointed ticketing agents, non-appointed ticketing agents, and rewards members. (Pet. App. 31A-32A, 42A, 44A-45A) (Brief App. 2A-3A)[1]. Main St. is one such defendant that has been sued for selling, arranging for, pricing, and booking travel, and issuing tickets for air travel services to be provided by an air carrier. (Pet. App. 31A) (Brief App. 16A-18A ¶¶ 78-85). American claims that it provided such travel and was harmed. (Pet. App. 32A ¶ 2). American seeks, through the application of state tort law, to impose restrictions on the sale and pricing of

1 References to "Pet. App." refer the Court to the appendix attached to the Petition for Review; References to "Brief Pet." refer the Court to the appendix attached hereto.

the services of an air carrier that may provide air transportation under the Airline Deregulation Act.[2] (*See* Pet. App. 32A at ¶ 2, 50A at ¶ 2).

49 U.S.C. § 41713(b) preempts state action in enforcing state created remedies that relate to the prices, routes, or services of an air carrier that may provide air transportation:

> (1) Except as provided in this subsection, a State . . . may not . . . enforce a law . . . or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (2008)

In the courts below, the petitioning parties argued that American's causes of action relate to "a

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2 Commonly referred to as the ADA, the predecessor provision prohibited states from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier[.]" Former 49 U.S.C.App. § 1305(a)(1). When it reenacted the preemption provision as 49 U.S.C. § 41713(b)(1), Congress intended to make no substantive change. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222-23 & n. 1, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995) (citing Pub.L. 103-272, § 1(a), 108 Stat. 745).

price, route, or service of an air carrier" and are therefore preempted. American asserted that preemption is determined by the identity of the litigants, rather than the subject matter of the claims, and therefore claims made by air carriers are not within the preemptive scope of the ADA. (Brief App. 21A).

Despite nearly twenty years of ADA jurisprudence, there remains substantial conflict among the courts as to whether the ADA preempts only claims brought against air carriers, (but not claims made by air carriers) so that preemption turns on the identity of the litigants, rather than the subject matter of the claims. The Texas court in this case held that "any attempt by [a carrier] to enforce via state law its own standards as to prices, routes, or services, including frequent flyer credits, is not preempted as impermissible state regulation." *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). This case presents an opportunity for this Court to resolve and clarify that the touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

Likewise, this case presents an opportunity for the Court to establish factors to consider in determining whether a claim meets the significant

impact test for preemption, such that the claim is not too tenuous or remote to invoke preemption under the ADA.

Finally, this case presents an opportunity for the Court to to determine whether the comprehensive administrative remedies promulgated by Congress allowing air carriers to bring administrative complaints against ticket agents, indicates that Congress intended to preempt matters within the scope of available administrative remedies.

REASONS FOR SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

In its petition, Frequent Flyer Depot questions whether the Texas Courts erred in narrowly construing 49 U.S.C. § 41712 and 49 U.S.C. § 41713 in holding that business tort claims against non-air carriers are not preempted by the ADA.

In support of certiorari, Main St. shows the following:

I. The touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

It is well settled that preemption ultimately turns on congressional intent. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In this instance, the Act expressly preempts claims that are related to prices and services of an air carrier. 49 U.S.C. § 41713(b)(1); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390, 112 S.Ct. 2031, 2041, 119 L.Ed.2d 157 (1992). This Court has repeatedly held in favor of construing the plain meaning of the statutory language and finding that the ADA preemption clause is to be broadly interpreted. *See, e.g., Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 364, 128 S.Ct. 989, 994-95 (2008); American Airlines, Inc. v. Wolens*, 513 U.S. 219, 220, 230 (1995); *See also* H.R. Conf. Rep., at 83, U.S.Code Cong. & Admin. News 1994, pp. 1676, 1755 (expressing agreement with "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*"). This Court has recently recognized the "unusual breadth" of ADA preemption. *Altria Group, Inc. v. Good*, --- U.S. ----, 129 S.Ct. 538, 547, 172 L.Ed.2d 398 (2008).

A state claim is preempted where "(1) Congress expressly preempts state law; (2)

Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme; or (3) state law conflicts with federal law or interferes with the achievement of federal objectives." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983); *Hodges v. Delta Airlines*, Inc., 44 F.3d 334, 335 n.1 (5th Cir. 1995) (citing *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)).

In this case, American is seeking to employ state law claims (in lieu of pursuing its administrative remedies) in order to enhance the efficacy of its frequent flier program.

American claims that the actions of the defendants in this case harm it because revenues are diverted, and it is forced to carry passengers for whom it has not received its full measure of revenue, in turn displacing or raising the price of paying passengers (an ipso facto admission that the alleged acts of defendants' significantly impact the prices and services of American.) (Pet. App. 32A ¶ 2, 47A ¶ 122).

American further complains of travel agents and brokers setting a price for AAdvantage miles and tickets, and it alleges it is harmed by loss of fares and dwindling seat availability for other passengers. *Id.* Such causes of action sounding in tort could not more clearly relate to "prices" and "services" of an air

carrier. If the alleged conduct made the subject of the suit "relates to" the areas of preemption under the Act, state law claims based on that conduct are preempted. *American Airlines v. Wolens,* 513 U.S. 219, 226 (1995).

In this case, the Texas court has authorized American's employment of state created remedies to restrict and discourage actual and potential competition, and to stifle efforts by ticketing agents and others in the travel industry from being innovative and delivering low prices for air transportation services. *See e.g. Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). Such holding is contrary to this Court's instruction in *Wolens*, and Congress' intent to insure that "maximum reliance on competitive market forces would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (citing 49 U.S.C.App. §§ 1302(a)(4), 1302(a)(9)).

In the absence of clarification from this Court, lower courts continue to struggle with the scope of preemption under the ADA. For instance, the Second Circuit has focused on the meaning of "related to" in the ADA preemption statute. *Abdu-Brisson v. Delta Air Lines, Inc.*, 128 F.3d 77, 82-84 (2d Cir. 1997).

That court observed that " [r]elated to appears to be developing, to some degree, to mean whether state law actually 'interferes' with the purposes of the federal statute, in this case airline deregulation." *Id.* at 82.

The Sixth Circuit joined the Second Circuit's preemption analysis. *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999).

The Ninth Circuit sat *en banc* to address the reach of the ADA preemption statute. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). In *Charas*, passengers sued airlines, under both tort and contract theories, for injuries obtained during flights. *Id.* at 1261-62. The Ninth Circuit held that the ADA preempts "only state laws and lawsuits that would adversely affect the economic deregulation of the airlines and the forces of competition within the airline industry." *Id.* at 1261.

The Third Circuit has followed the Ninth Circuit's ADA preemption analysis. *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998).

The Fifth Circuit and Seventh Circuit, relying on this Court's ruling in *Wolens* have adopted far more expansive interpretations of preemption. *See Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282,

287 (5th Cir. 2002); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 608-9 (7th Cir. 2000); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751, 775 (7th Cir. 1989).

American freely admits that the state claims for unfair business practices it seeks to bring as a plaintiff, would be preempted if brought against it whether as a claim or counterclaim. (Brief App. 23A, n.2)

Generally, claims of unfair business practices that relate to the rates, routes, or services of an airline are preempted. *See e.g. American Airlines v. Wolens*, 513 U.S. 219, 228-29; *Buck v. American Airlines, Inc., 476 F.3d 29, 38* (1st Cir. 2007); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 34 Fed. R. Serv. 3d 601 (7th Cir. 1996); *Ex parte Delta Air Lines, Inc.*, 785 So. 2d 327 (Ala. 2000); *Monzingo v. Alaska Air Group, Inc.*, 112 P.3d 655 (Alaska 2005); *Weber v. Moses*, 938 S.W.2d 387 (Tenn. 1996); *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 522 n. 7 (5th Cir. 2002); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1252 (6th Cir.1996); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 540-41 (7th Cir. 1993). Yet, American argues, and the Texas court in this case agreed, that American is free to bring those same preempted tort claims as a plaintiff, because the preemptive provisions of the Act do not reach American in its

capacity as plaintiff. (Brief App. 21A, 23A)(Pet. App. 8A).

American's argument is that the identity of the litigant, rather than the subject matter of the claim triggers preemption, and thus, its claims are not preempted.

In *Rowe v. New Hampshire Motor Transport Ass'n,* 552 U.S. 364, 128 S.Ct. 989 U.S. (2008) this Court recently held that claims are preempted when a state law claim has a " significant impact" on "prices and services." *Id.* Interpreting *Rowe*, one trial court has already held if the state law claims are preempted, "[t]he identity of the plaintiff is irrelevant." *Travers v. JetBlue Airways Corporation,* Slip Op., 2009 WL 2242391 at*2 (D. Mass. 2009). The Texas court in this case, held the opposite. *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215 (Tex. App. --Fort Worth 2009, pet. denied). Main St. contends that it "[n]othing in the ADA suggests that [preemption] applies only to suits against an air carrier" and "it is preposterous to assume Congress intended" such. *Marlow v. AMR Services Corp.* 870 F. Supp. 295 (D. Hawaii 1994). As a result, preemption turns on the nature of the claims made, not the identity of the party making them.

This Court's guidance is required to clarify

whether preemption under the ADA turns on the identity of the litigants, or the subject matter of the claims. There are clearly state law claims, such as those advanced by American in this case, which would have a "significant impact," on airlines' prices and services. American stipulates as much in its pleadings. (Pet. App. 32A ¶ 2, 47A ¶ 122).

American's rationale for arguing that identity of the litigant dictates preemption is that the preemption provisions of the Act are designed to afford airlines special protections which are not available to non-airlines. (Brief App. 23A). Main St. however avers that claims are preempted if they "relate to" the prices, routes or services of an air carrier. *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 n.8 (5th Cir. 2002).

Trial courts have struggled with American's contention that the identity of the litigant dictates preemption. " . . . in the Court's view, it is preposterous to assume that Congress intended to block the prosecution against air carriers of certain suits but to allow those same suits to proceed against all others." *Continental Airlines v. American Airlines,* 824 F. Supp. 689, 697 (S.D. Tex. 1993). In *Travers v. JetBlue Airways Corporation,* the trial court reasoned that the ADA preemption analysis must focus on the effect of the state law on the airline's "services and rates," and that "[t]he identity of the

plaintiff is irrelevant." *Travers v. JetBlue Airways Corporation,* Slip Op., 2009 WL 2242391 at*2 (D. Mass. 2009). Indeed, the statute itself is not limited to airlines, and references claims brought against direct air carriers, indirect air carriers, and ticketing agents, in addition to other persons against whom state tort claims are preempted. *See e.g.* 49 U.S.C. § 41712 (2008). There is no mention of preferential treatment for an airline.

To hold that the Act applies only to claims made against air carriers, and not claims made by air carriers, neglects the clear and express provisions of the Act. To hold that only claims of non-air carriers are preempted, while claims made by air carriers are not preempted requires an explicit abandonment of the express directives of the Act, and a rejection of the most basic principles of statutory construction. It is the subject matter of the claims, rather than the identity of the individual litigant, that Courts are to examine to determine whether that "law. . . or other provision" being enforced is "related to a price, route, or service of an airline." *See* 49 U.S.C. § 41713; *Continental* at 697.

Certiorari is warranted to resolve and clarify that the touchstone for preemption under 49 U.S.C. § 41713 is the subject matter of the claims being asserted, not the identity of the litigants.

II. **This case presents an opportunity for the Court to establish factors to consider in determining whether a claim meets the significant impact test for preemption, such that the claim is not too tenuous or remote to invoke preemption under the ADA.**

Mr. Justice Breyer, in *Rowe,* explained that :

> *Morales* said that federal law might not pre-empt state laws that affect fares in only a 'tenuous, remote, or peripheral . . . manner,' . . . But the Court did not say where, or how, 'it would be appropriate to draw the line . . .

128 S.Ct. at 995.

Courts continue to struggle with "where or how it would be appropriate to draw the line" in regard to characterizing claims as too tenuous remote, or peripheral to escape preemption. This case is uniquely situated to permit this Court to articulate a test that may be applied to determine when claims are too tenuous, remote, or peripheral to be preempted, and to determine when claims significantly impact airlines' rates, routes, or services so as to trigger preemption.

In *Rowe v. New Hampshire Motor Transport Ass'n*, this court explained that:

> . . . federal law does not pre-empt state laws that affect rates, routes, or services in "too tenuous, remote, or peripheral a manner." *Morales*, 504 U.S., at 390, 112 S.Ct. 2031 (internal quotation marks omitted). And we have written that the state laws whose "effect" is "forbidden" under federal law are those with a " significant impact" on carrier rates, routes, or services. *Id.*, at 388, 390, 112 S.Ct. 2031 (emphasis added)

552 U.S. 364, 128 S.Ct. 989, 997 (2008).

Trial courts applying this test have determined that an amount as small as "the airline's imposition of a $2 fee" is not so small that it would avoid preemption. *Brown v. United Air Lines, Inc.*, 656 F. Supp. 2d 244 (D. Mass. 2009).

Without a clear test to determine whether claims are "too tenuous, remote, or peripheral," and even after the pronouncement of the significant impact test, lower courts have struggled to define the limits of preemption. For instance, in *Wolens*, this court extended preemption to claims involving frequent flier programs. Likewise, in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889

F.2d 751, 775 (7th Cir. 1989) the Seventh Circuit held that claims relating to discounted tickets were preempted. Nevertheless, trial courts struggling with the limits of preemption have held that claims related to discount airfare coupons are not preempted. *Cont'l Airlines, Inc. v. Weiner*, 1999 U.S. Dist. Lexis 16377 at *15 (C.D. Cal. 1999). Post-*Rowe*, in *Alaska Airlines, Inc. v. Carey*, Slip Copy, 2009 WL 777391 at *2 (W.D. Wash. 2009) the court held that state law claims against a ticket broker were too tenuous or remote when they did not have "an adverse effect on airline competition." *Id.* The *Carey* court failed to address the significant effect test at all, thus reinforcing the need for clear guidance from this Court.

Trial court decisions applying the *Rowe* significant impact test have not yet reached appellate review. However, there is little doubt from the opinions that exist that the *Rowe* significant impact test is being interpreted to expand the scope of preemption under the ADA. As an example, in *DiFiore v. American Airlines, Inc.*, 483 F. Supp.2d 121, 125-26 (D. Mass. 2007) the court held that tip claims made by skycaps were not preempted because the relationship between a $2 fee and an airline's "price, route, or service" was "too tenuous to support preemption." However, post-*Rowe*, in *Brown v. United Air Lines, Inc.*, 656 F. Supp.2d 244 (D. Mass. 2009), and *Travers v. JetBlue Airways Corp.*, 08-

10730, 2009 WL 2242391, at *2 (D. Mass. 2009) the same claims involving the same fees were found to be preempted following this Court's pronouncement of the significant impact test.

Without additional guidance, litigants and courts will continue to struggle with "where or how it would be appropriate to draw the line" in regard to preemption under the significant impact test as it pertains to ADA preemption. This case provides an opportunity for the Court to provide that much needed guidance to a body of jurisprudence that fundamentally effects one of the largest and most sensitive industries in the country, to wit: the travel industry.

III. This case presents an opportunity for the Court to determine whether the comprehensive administrative remedies promulgated by Congress allowing air carriers to bring administrative complaints against ticket agents, indicates that Congress intended to preempt matters within the scope of available administrative remedies.

Main St. avers that American's claims are 1) expressly preempted under the Act; 2) are preempted because of the regulatory scheme in place; and 3) because they would otherwise interfere with the achievement of federal objectives by state regulation

of the travel industry, including frequent flier programs.

Under the Act, the Secretary of Transportation is directed to promulgate regulations, maintain uniform standards nationwide, and to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation." 49 U.S.C. § 40101(a)(9). Likewise, the DOT is charged with "encouraging, developing, and maintaining an air transportation system relying on actual and potential competition (A) to provide efficiency, innovation, and low prices; and (B) to decide on the variety and quality of, and determine prices for, air transportation services." 49 U.S.C. § 40101(a)(12).

As the Fifth Circuit explained in *Lyn-Lea*:

> While some airline business dealings undoubtedly do not "relate to" prices, routes and services, the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns.

283 F.3d at 288.

When Congressional intent to preempt is inferred from the existence of a pervasive regulatory scheme the state claim is preempted. *Shaw*, 463 U.S. at 95. Congress expressly stated a method for regulation over disputes related to unfair competition and unfair or deceptive practices between carriers and ticket agents, to wit: the air carrier can complain to the Secretary of Transportation who investigates and issues order. 49 U.S.C. § 41712.

The Act expressly preempts claims "related to price, routes, or services of an air carrier" and any claims for which an administrative remedy under "this subpart" is provided. 49 U.S.C. §41713 (2008). In said subpart, the Act provides an administrative remedy for complaints made by an air carrier, including airlines, against other air carriers or ticket agents. *See* 49 U.S.C. §41712 (2008).

> On the . . . complaint of an air carrier . . . the Secretary may investigate and decide whether [a] . . . ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation.

49 U.S.C.A. § 41712 (2008).

Title 49, Subtitle VII, Part A, subpart i, Chapter 401, §40102 defines "air carrier" and "ticket agent" as follows:

> (2) "air carrier" means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.
>
> * * *
>
> (45) "ticket agent" means a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.

49 U.S.C. §40102 (2008) [Emphasis added].

Main St. is alleged by plaintiff to be a "ticket agent" within the meaning of the Act by virtue of the Airline Reporting Agreement (ARA) and American's Addendum To The ARC. (Brief App. 2A-3A at ¶ 9, 7A-9A, 17A at ¶ 79). Main St., on behalf of American, is alleged to have sold, offered for sale, negotiated for, arranged, booked reservations for, and directly issued tickets for air transportation, (Brief App. *Id.* American further alleges that Main St. was its agent pursuant to the ARC and American's Addendum to the ARC during the relevant time period. (Brief App. 2A at ¶ 9, 7A at¶30).

It is undeniable from a plain reading of American's pleading that all tortious acts and omissions alleged to have been committed by Main St. and Frequent Flyer Depot in this case were allegedly committed while engaged in the selling, offering for sale, negotiating for, or holding themselves out as selling, providing, or arranging for, air transportation. The crux of American's claims is that the defendants fraudulently arranged for air transportation. (See Brief App. 17A at ¶¶ 82, 83; Pet.App. 41A-45A at ¶¶ 101, 105, 108, 109, 113, 114, 117; 45A at ¶ 122).

Because it is those alleged actions, averred to constitute wrongfully "arrang[ing] for air transportation," that form the basis of American's tort claims, such claims are squarely under the umbrella of preemption. When party engages in such actions, either on its own as a principal (Frequent Flyer Depot), or in its capacity as an agent for the airlines (Main St.), that party is a ticketing agent under the Act and a comprehensive administrative remedy is available to an aggrieved party. Accordingly, preemption under the ADA applies to claims made against such a party. 49 U.S.C. §41713 (2008); 49 U.S.C. §40102 (2008).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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American's Opposition to Defendants' Motion to Dismiss.....21A

No. 067-224132-07

AMERICAN AIRLINES, INC.

v.

REQUENT GLYER DEPOT, INC., GEORGE PIRKLE, ROBERT PIRKLE, LTS, LUXURY TOUR SOURCE, LTD., MUKESH KUMAR GOYAL, MAIN ST. TRAVEL CENTER OF MONSEY, INC., BEN WEBER, ISRAEL ODZE, AND JOHN DOE I.

IN THE JUDICIAL DISTRICT OF
TARRANT COUNTY, TEXAS
67TH JUDICIAL DISTRICT

PLAINTIFF'S THIRD AMENDED PETITION

[Paragraphs 1-6 are omitted as they are included in Petitioners Appendix; Paragraphs 7 and 8 are omitted as they are not relevant to the issues.]

Parties

9. Defendant Main St. Travel Center of Monsey, Inc. ("Main St.") is a New York corporation. It has been served with process and has filed a special appearance. It has operated primarily as a travel agency engaged in the sale, among other

things, of airline tickets, and has participated in booking reservations and/or issuing tickets for passengers for flights on American, pursuant to a written contract known as the American Airlines Addendum to the ARC Agent Reporting Agreement, which has a jurisdiction selection clause pursuant to which Main St. submitted to the jurisdiction of the courts of the State of Texas for this dispute.

10. Defendant Ben Weber ("Weber") is an individual whose office address is 71 Route 59, Suite B, Monsey, New York, 10952. He has been served with process and has filed a special appearance. He is President of Main St.

11. Defendant Israel Odze (a/k/a Yisroel Odze) ('Odze") is an individual whose residential address is 481 Crown Avenue, Apt. A10, Brooklyn, New York, 11225. Service of process on him at this address has been unsuccessful. He is an agent or representative of Main St.

[Paragraph 12 is omitted as it is not relevant to the issues; Paragraphs 13-14 are included in Petitioners' Appendix.]

Jurisdiction and Venue

15. This Court has personal jurisdiction over defendant Main St. because it submitted to jurisdiction in the Courts of Texas for this dispute,

has continuous and systematic contacts with Texas, and purposefully availed itself of the privilege of doing business in Texas. Specifically, Main St. admits it is bound by the terms and conditions of the Airlines Reporting Corporation Agent Reporting Agreement ("'ARC Agreement") and the American Airlines' Addendum to the ARC Agreement (['the Addendum"), pursuant to which Main St, agreed that disputes, such as this, arising out of the Addendum are to be submitted to the courts of the State of Texas.

16. This Court has personal jurisdiction over defendant Weber because he has continuous and systematic contacts with Texas and purposefully availed himself of the privilege of doing business in Texas. Specifically, Weber admits as president of Main St. he reached out to American in Texas by telephone and email to do business with it, was dealing with American on a daily basis, and the financial benefits reaped by that business would benefit him personally in the long run. However, Weber failed to disclose to American that Main St. was defrauding the AAdvantage program.

[Paragraphs 17 and 18 are omitted as they are not relevant to the issues; Paragraph 19- 20 are included in Petitioners' Appendix; Paragraphs 21-22 are not relevant to the issues.]

Facts Giving Rise to This Action

B. The ARC Reporting Agreement

A. American's Efforts to Protect Its Property

23. Over the last 75 years, Fort Worth-based American has grown to be the largest commercial airline in the world, with the greatest number of passengers carried, the most revenue passenger miles flown, and the largest fleet of planes.

24. American's AAdvantage frequent flyer program is designed to develop passenger loyalty and increase revenues by rewarding its best customers those who regularly fly American. It is the oldest and most used frequent flyer program in the industry Membership is limited to individuals.

25. In exchange for adhering to the AAdvantage contract that sets out the rules the program and its members, members accrue mileage credit by flying on American or its partner airlines, staying at hotel partners, renting a car from a partner company, or by other means. Mileage credit accrues only to the account of the member who flies, stays at a hotel, rents a car, or earns it by other lawful means. In consideration for accumulating specified mounts of mileage credit, members earn award tickets for free travel on American or its

partner airlines, upgrades to a higher class of service, and other benefits. AAdvantage award tickets and upgrades may be issued in any name designated by the AAdvantage member at the time the request is made.

26. The AAdvantage contract is made available to members and the public in several written forms, including in the program application and on American's website, AA.com. The rules in the AAdvantage contract state, "accrued mileage credit and award tickets do not constitute property of the members." They belong to American. American protects them by prohibiting their purchase, sale, or barter and enforcing penalties for violations, a term known as the "No-Sale Rule." Specifically, (i) "Any such mileage or tickets are void if transferred for cash or other consideration"; (ii) "Use of award tickets that have been acquired by purchase or for any other consideration may result in the tickets being confiscated or the passenger being denied boarding"; and (iii) "If a trip has been started, any continued travel will be at the cost of a full fare ticket for any segments flown on a sold or bartered ticket."

27. American seeks to enjoin and recover damages resulting from defendants' widespread violations of the No-Sale Rule.

B. The ARC Reporting Agreement

28. The Airlines Reporting Corporation ("ARC") is an airline-owned company serving the travel industry in the United States, Puerto Rico, and U.S. Virgin Islands. ARC provides ticket distribution, reporting, and settlement services for over 145 air and rail carriers and more than 20,000 ARC-accredited travel agencies and corporate travel departments.

29. To become ARC accredited, a travel agency must meet, and continue to meet, certain minimum requirements and qualifications, including financial requirements and personnel standards. The agency also must enter into a contract with ARC known as the Agent Reporting Agreement ("ARC Agreement"). An ARC-accredited agency is bound by the terms and conditions of the ARC Agreement and its addendums.

30. The ARC Agreement effectively appoints the ARC-accredited travel agency as an agent for the various airlines -- including American -- that have a contractual relationship with ARC in the sale of air transportation. Thus, for an agency like Main St. to be authorized to issue tickets and upgrades for travel on American, it must enter into the ARC Agreement, which includes the terms and conditions set forth in the American Airlines Addendum to the Agent Reporting Agreement ("Addendum").

31. The Addendum covers all travel agencies in the United States acting for American that have entered into the Agent Reporting Agreement with ARC. It is intended to, and does, clarify the agency's responsibilities and duties under the ARC Agreement. The agency's continued sale of air transportation on American evidenced its and American's mutual agreement to the terms and conditions contained in the Addendum.

32. Addendum § 3(a), Compliance with American's Rules and Rates, states:

Agent shall strictly adhere to American's current instructions, rules, regulations,requirements, conditions of sale or carriage, tariffs, and procedures (the "Rules") in booking any reservation *or* issuing, reissuing, selling, exchanging, refunding, or reporting any ticket calling for transportation on American. Failure to comply subjects Agent to debit memos from American for an amount equal to either the cost of the ticket, the difference between the fare paid and the applicable fare, or an administrative service charge, as American deems appropriate, and termination of Agent's appointment.

33. Addendum § 3(b), Advantage®/Promotional Programs, states:

Agent agrees to comply with all Rules governing the AAdvantage Program and, other promotional programs, including the issuance of promotional certificates and tickets. Agent acknowledges that the purchase, sale, or barter of promotional or AAdvantage® awards, mileage, or tickets (other than a purchase from American) is strictly prohibited and that Agent's direct or indirect involvement in any of these activities subjects Agent to (1) debit memos for the applicable fare or any losses sustained by American due to this activity, (2) termination of Agent's appointment, and (3) legal or equitable remedies.

34. Addendum § 5(a), Issuance of Debit Memos, states:

If Agent issues a ticket in violation of the ARC Agreement or this Addendum, American may issue a debit memo to Agent for any deficiency or any loss incurred by American by reason of the violation.. ..American also retains all rights and remedies available to it under the ARC Agreement or at law or in equity.

35. Addendum 5 S(b), Payment of Debit Memos, states:

Agent agrees to pay or reconcile all debit memos issued by American within 30 days of the date of issuance. If Agent fails to do so, American reserves the right to assess, and Agent *agrees* to pay, interest on the past due amounts at a rate not to exceed one and one-half percent (1 1/2 %) per month, compounded monthly, or the maximum rate permitted by law, whichever is less, &om the date due to the date of the payment.

36. The Addendum has a jurisdiction selection clause pursuant to which ARC-accredited travel agencies consent to the jurisdiction of the courts of the state of Texas for all disputes between American and the agent arising out of the ARC Agreement or the Addendum. Specifically, Addendum $ 10(c), APPLICABLE LAW, states in all capital letters:

THE LAWS OF THE STATE OF TEXAS AND THE UNITED STATES-OF AMERICA SHALL GOVERN ANY DISPUTES BETWEEN AMERICAN AND AGENT ARISING OUT OF THE ARC AGREEMENT OR THIS ADDENDUM. AGENT HEREBY SUBMITS AND CONSENTS TO THE NON-EXCLUSIVE JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AND THE COURTS OF THE

STATE OF TEXAS FOR ALL THESE DISPUTES.

37. At all relevant times, Main St. was an ARC-accredited travel agency bound by the terms find conditions of the Agent Reporting Agreement and the Addendum, including the jurisdiction selection clause pursuant to which it submitted to the courts of the State of Texas for disputes arising out of the ARC Agreement and Addendum.

C. Defendant FFD's Wrongful Conduct

[Paragraphs 38-54 are omitted as they are included in the Appendix of Petitioner.]

E. Defendant LTS's Wrongful Conduct

55. LTS is in business to buy AAdvantage mileage credit and award tickets from AAdvantage members and then sell the wrongfully-obtained award ticket to American's potential customers, all without compensation to American. It operates with knowledge that under the AAdvantage rules neither mileage credit nor award tickets may be purchased, bartered, or sold, and that the mileage and tickets are void if transferred for cash or other consideration. LTS's actions are calculated to target end injure the AAdvantage program.

56. LTS operates its deceptive schemes through numerous websites. Some are for travelers

looking to buy American's most profitable tickets, first and business class, such as www.LuxuryTravelSource.com, www.WiseFlyer.com, www.DiscountTravelBrokers.com, and www.ExecutiveTravelBrokers.com. One site, www.SellYourPoints.com, is designed to induce AAdvantage members to sell their mileage credit in violation of the No-Sale Rule. At other LTS websites, www.FirstClassTickets.com and www,Mileageking.com, users can either purchase airline tickets for first-class and business-class seats or sell their mileage credit.

57. Through these websites, LTS targets its customers. Prospective buyers complete and submit a questionnaire with their contact information and desired itinerary. They are asked to choose the highest price they are willing to pay for a ticket, permitting LTS to price its tickets to maximize profits. It advertises its sale of wrongfully-obtained tickets on other sites, including Official Travel Industry Directory (www.otid.com), JaxFax Travel Marketing (www.jaxfax.com), and TravelAgent Newsweekly (www.advanstars-web-support.com/PRODUCTS/TAM/prod2537.html).

58. Despite its knowledge of the No-Sale Rule, none of the LTS sites disclose that the tickets are void because they are award tickets that were purchased and sold.

59. Likewise, the LTS websites misrepresent the propriety of selling mileage credit and award tickets. Its SellYourPoints.com website states, "There is no federal or state law restricting the sale, bartering or transfer of miles in 49 or the 50 states (Utah being the exception)," and a disclaimer on its MileageLink.com website states, "It is totally legal to transfer miles to a third party. While the airline frowns upon the 'selling' of miles and certificates, it is currently being done around the world."

60. Once LTS matches a buyer and a seller, it calls or causes a call to be made to American reservations -- including call centers in this State -- to reserve the ticket in the name of its customer, the buyer. LTS induces the seller, an AAdvantage member, to use his mileage credit to make a reservation with American in the name of the LTS customer, while conceding the fact that the ticket will be sold. American, without knowledge of this fact, issues the requested award ticket. LTS pays the seller for the mileage credit and then sells the ticket to its buyer. American receives no consideration in the transaction.

61. LTS has induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to LTS, in violation of the No-Sale Rule; to contact American reservations to request issuance of award tickets in the names of

individuals to whom LTS will wrongfully sell the tickets; and to conceal from American their intention to sell the mileage credit and award tickets to LTS.

62. By way of example, one AAdvantage member residing in Dallas sold LTS award tickets processed on Aug. 19, 2005, Nov. 13, 2005, Dec. 20, 2005, and Jan. 9, 2007. Another residing in Irving sold LTS an award ticket processed on Mar. 15, 2006.

63. LTS sent an email to an AAdvantage member on May 14,2007 advising that he lie to inquiries from American, by fraudulently misrepresenting that LTS "provides a service to you where by [sic] they set up reservations for you so that you can use your frequent flyer miles. It has become so difficult to find award space on your own that it is worth it to pay a $100 booking fee to this company to set things up for you."

64. LTS has made misleading statements to induce those who purchased the wrongfully obtained AAdvantage award tickets to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite its knowledge that award tickets are void once purchased or sold.

65. Numerous individuals have traveled on American or its partner airlines using void award tickets wrongfully sold by LTS. They likely would

have purchased tickets from American had they not obtained the void award tickets from LTS. Furthermore, they likely displaced other potential AAdvantage members or American customers who would have purchased tickets from American, had the seats occupied by travelers with void award tickets been available.

66. LTS has wrongfully purchased at least 55,715,000 AAdvantage mileage credits and wrongfully obtained at least 492 award tickets valued at more than $4.6 million. American has paid to transport these passengers without compensation in first-class and business-class seats, its most profitable service.

67. In addition, LTS wrongfully obtained five award tickets that American did not honor for travel because it determined that the tickets had been sold and thus were void.

68. American has lost goodwill with AAdvantage members prevented from obtaining free award travel on American because the seats were occupied by individuals using wrongfully obtained tickets, and with the general public who paid higher prices to American for valid tickets than those offered by LTS for wrongfully-obtained tickets. American also has been forced to expend significant resources to investigate LTS's improper activities.

69. Because AAdvantage mileage credit and award tickets are highly valuable, and because LTS's sole business purpose is to buy, sell, and barter them, it is likely that LTS will continue to wrongfully barter and sell mileage credit and award tickets.

70. In addition, LTS improperly trades on American's goodwill 'and reputation in promoting its business and attracting consumers to its websites. Specifically, the homepage of www.SellYourPoints.com prominently displays an American logo under the heading: "We buy miles from the following carriers." A page on the LuxuryTravelSome.com website displays an American logo next to text that describes first-class and business-class travel on American flights. FirstClassTickets.com displays an American logo under the heading "Featured Airlines."

F. Defendant Mukesh Kumar Goyal's Wrongful Conduct

[Paragraphs 71-77 have been omitted]

G. Defendants Main St.'s, Weber's, and Odze's Wrongful Conduct

78. Main St., Weber, and Odze engaged in a scheme to broker AAdvantage mileage credit and award tickets to American's potential customers, all without compensation to American. They did this

with knowledge that neither mileage credit nor award tickets may be purchased, bartered, or sold, and the mileage and tickets are void if transferred for cash or other consideration. Their scheme is calculated to target and injure the AAdvantage program.

79. Main St. was an ARC-accredited travel agency. Based on its actions in violation of the Addendum, American issued a debit memo to it in the sum of $1,763,133.87 on January 31, 2007, which Main St. has failed to pay, in further violation of the Addendum. American terminated its appointment as its agency.

80. Weber is President of Main St. He has detailed knowledge of its wrongful operations k d personally directed, authorized, and participated in them.

81. Odze acted as an agent of Main St. It granted him access to its computerized international air travel reservation system (i.e., SABRE) and assigned a sign-in access code/name to him so he could act on its behalf.

82. Main St., Weber, and Odze brokered, purchased, and sold thousands of fraudulently-obtained AAdvantage mileage credit for hundreds of award tickets and upgrades. With SABRE access, Odze made reservations for travel on American using

wrongfully-obtained mileage credit.

83. To carry out their scheme, Main St., Weber, and Odze induced AAdvantage members -- including Texas residents -- to sell their mileage credit or award tickets to them, in violation of the No-Sale Rule and the Addendum; to request from American issuance of award tickets in the names of the individuals to whom they wrongfully sold the tickets; and to conceal from American their intention to sell the mileage credit and award tickets to defendants.

84. They induced customers that purchased wrongfully-obtained AAdvantage award tickets and upgrades to believe that they had received valid airline tickets good for travel on American or its partner airlines, despite their knowledge that award tickets and upgrades are void once purchased or sold.

85. Because AAdvantage mileage credit and award tickets are highly valuable, and because Main St., Weber, and Odze wrongfully buy, sell, and barter them, it is likely that they will continue to do so.

[Paragraphs 86-96 are omitted as they are not relevant to the issues. Paragraphs 97-127 and the "Prayer for Relief" section are omitted as they are included in Petitioner's Appendix.]

Respectfully submitted,
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NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC. et al.

IN THE DISTRICT COURT
67th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

MOTION TO DISMISS

Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("FFD defendants"), Luxury Travel Source and Mukesh Kuhmar Goyal ("LTS defendants"), and Main St. Travel Center of Monsey, Inc. and Ben Weber ("Main St. defendants") (jointly referred to as the "Moving defendants") move to dismiss American Airlines' non-contract claims against them on the grounds that such claims are preempted by the Airline Deregulation Act of 1978.

[The remainder of the Motion is omitted.]

NO. 067-224132-07

AMERICAN AIRLINES, INC.

VS.

FREQUENT FLYER DEPOT, INC. et al.

IN THE DISTRICT COURT
67th JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

AMERICAN'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants ask the Court to do what no other court has done: dismiss an airline's state law claims against entities that are not "air carriers," as preempted under the Airline Deregulation Act of 1978 ("ADA"). The motion is as legally flawed as it is ironic.

Courts around the country *that* have addressed ADA preemption have rejected the upside-down position argued by Defendants. Their misguided theory ignores the Act's purpose -- to prevent re-regulation of *airlines* -- and its plain language, which prohibits states *from* enforcing laws "related to a price, route, or service of an *air carrier*." 49 U.S.C. 41713 (b)(1) (emph. added). Quite simply, American's claims do not relate to prices, routes, or services "of an air carrier" because Defendants indisputably are not airlines. On the contrary, their business of illicitly brokering frequent-flier miles and award tickets injures airlines, like American, which are burdened with the

cost of carrying unauthorized no-revenue passengers.

Because American's claims fall outside the scope of ADA preemption, the motion should be denied on its merits. In addition, as a procedural matter, the motion should be denied because it is not presented as a motion for summary judgment, with its usual prerequisites.

Pertinent Background

This suit is to end chronic frequent flyer fraud against the AAdvantage® travel rewards program. American operates the program to generate customer goodwill and sales by providing value to its best flyers through recognition and rewards. In exchange for adhering to the AAdvantage contract that sets out the program's terms and conditions -- including the No-Sale Rule prohibiting the sale, purchase, or barter of miles and awards -- members accrue miles that can be redeemed for free travel on American and its partner airlines. *See* 3rd *Am.* Pet. ¶¶ 25-26. Defendants are non-airlines that profit off of American (and other air carriers) by selling frequent flier award tickets to American's potential customers, with no payment to American and in direct violation of the No-Sale Rule. *See* id ¶¶ 38-85.

Defendants have injured American by diverting revenues it should have received, burdening it with the cost of providing unearned free air travel, and causing it to lose goodwill with AAdvantage members and the traveling public. American seeks redress under state law for defendants' fraud, interference, and

misappropriation, as well as damages and injunctive relief to end their chronic fraud. *See id* ¶¶ 96-99; 101-19; 122-23; 128-34.

[Pages 2-5 are omitted]

1. Defendants are not air carriers providing airline services

[Paragraph omitted]

The ADA does not prevent an airline from taking proper legal action under state law against those who wrongfully injure it. Neither the Act's language nor its intent supports defendants' misguided theory of preemption. Rather, the ADA's preemption scheme sought to eliminate issues like the pricing anomalies that airlines faced when subject to overlapping federal and state regulation. See H.R. Rep. No. 95-1211, at 15-16. American's claims do not relate to prices, routes, or services "of an air carrier" because defendants are not airlines.[2]

[2] In contrast, Defendants' state law counterclaims against American are subject to *ADA* preemption because they relate to the prices and services of American an air carrier. On this basis, American will file a motion for summary judgment of these claims.

[The remainder of the motion is omitted.]

Supreme Court, U.S.
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No. 09-815

IN THE

Supreme Court of the United States

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE, AND ROBERT PIRKLE,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Second District

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

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February 25, 2010

QUESTION PRESENTED

Whether 49 U.S.C. §41713(b)(1) preempts American Airlines's tort claims seeking to protect American's contractual rights and that do not "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."

CORPORATE DISCLOSURE STATEMENT

Respondent American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation, which is a publicly traded company.

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IN THE

Supreme Court of the United States

No. 08-915

FREQUENT FLYER DEPOT, INC.,
GEORGE PIRKLE, AND ROBERT PIRKLE,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Second District

BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES, INC.

INTRODUCTION

The Court should deny review of the interlocutory judgment of the Texas intermediate court of appeals because the Court lacks jurisdiction to review the lower court's judgment, this case does not present any important issue of federal law on which the lower courts disagree, and this case is a poor vehicle for addressing the questions presented.

American sued petitioners and a number of other parties to stop them from selling frequent-flyer

tickets illegitimately obtained through the wrongful purchase of frequent-flyer miles in disregard and open breach of American's AAdvantage frequent-flyer program contract. Petitioners act as a broker between people with American frequent-flyer miles and people who do not want to purchase tickets legitimately from American or a travel agent. Even though petitioners admit that their business is based on encouraging members of American's frequent-flyer program to breach their contracts with American, they instruct American's contractual counterparties to lie to American. When petitioners refused to stop their ongoing misconduct during the pendency of this case, American obtained a temporary injunction from the state district court enjoining petitioners from continuing to facilitate the improper sale and purchase of American's frequent-flyer award tickets.

The case now presented to the Court arises from the state court of appeals's judgment from an interlocutory appeal of a temporary injunction. No federal or state law issue has been finally determined by the Texas state courts. The court of appeals's determination that 49 U.S.C. §41713(b) does not preempt some of American's tort claims against petitioners does not fully resolve any preemption issue in this case, and the upcoming trial on the merits may make resolution of the preemption issues unnecessary. In any event, there is no relevant conflict among the lower courts regarding §41713(b) that would affect the issues in this case.

OPINION BELOW

The opinion of the Texas intermediate court of appeals, Pet. App. 3a-27a, is reported at 281 S.W.3d 215. The district court's order granting

the temporary injunction is unreported. Pet. App. 28a-30a.

JURISDICTION

This court does not have jurisdiction over this case under 28 U.S.C. §1257(a) because the court of appeals's judgment affirming the district court's temporary injunction is interlocutory and is not a final judgment.

STATEMENT OF THE CASE

In 1981, American established the AAdvantage frequent flyer program to develop passenger loyalty and increase revenues by rewarding customers who regularly fly American. Since then, American has invested substantial time and money in developing and running the program. 1 Supp. CR 82.[1] Members accumulate AAdvantage miles by flying on American and using services of designated AAdvantage partners. Members can exchange the miles for free award tickets and flight upgrades on American and

---

[1] The record for this interlocutory appeal consists of a clerk's record, which includes the papers filed with the district clerk, and a reporter's record, which includes the transcript of the temporary injunction hearing and the exhibits admitted into evidence at the hearing. The clerk's record includes a First Supplemental and a Second Supplemental Clerk's record. Cites to the clerk's record are in the form [volume] CR [page], [volume] 1st Supp. CR [page], and [volume] 2nd Supp. CR [page]. Because this petition arises from an interlocutory appeal and the underlying case has continued to proceed in the trial court while the appeal has been pending, additional pleadings and other papers have been filed during the pendency of the appeal. In order for the Court to fully understand the current procedural posture of the case, it is necessary to refer to documents that have been filed in the trial court after the interlocutory appellate record was filed in this case.

its airline partners. American incurs the cost to transport passengers traveling on the award tickets. 1 Supp. CR 83. American issues its AAdvantage members award tickets for free flights so that it can increase customer loyalty and engender goodwill among its customers. 1 RR 93, 102, 105.

AAdvantage members agree to and are bound by the program's express terms and conditions. Among other commitments, they agree that "[a]ccrued mileage credit and award tickets do not constitute [their] property," and they consent to the "No Sale Rule," which provides that "[a]t no time may AAdvantage mileage credit or award tickets be purchased, sold or bartered. Any such mileage or tickets are void if transferred for cash or other consideration." PX 3.

Petitioner Frequent Flyer Depot, Inc. describes itself as "the premiere online brokerage of frequent flyer tickets and mileage rewards." 1 RR 71, PX 1. Petitioner George Pirkle owns 65% of FFD and directs its purchase and sale of AAdvantage miles and award tickets. 1 RR 30, 38-39. His son, petitioner Robert Pirkle, is president of FFD, owns 35%, and arranges transactions for customers to buy AAdvantage award tickets. 1 RR 31, 84-85.

Petitioners admit that they have known about the No Sale Rule for years. 1 RR 41 ("Q. You understand that Frequent Flyer Depot's actions that you direct violate the AAdvantage terms and conditions? A. Yes."); 1 RR 84; 2 CR 343, 351-352. Nevertheless, petitioners facilitate and induce repeated breaches of the No Sale Rule by buying mileage credit from program members and selling award tickets to American's potential customers, all without

compensation to the airline. 1 RR 35-38, 44, 46-47; 2 CR 300.

Petitioners induce these breaches by acting as brokers between AAdvantage members who have frequent-flyer miles and people who want to obtain tickets. For example, if A has a large balance of AAdvantage miles and B wants to fly first class to Japan, petitioners would instruct A to obtain a first-class ticket in B's name and would then pay A a substantial cash amount for the AAdvantage miles used to obtain the ticket. B would pay petitioners for the ticket an amount much less than B could purchase the ticket from American. Petitioners make their money on the difference between what they pay A and charge B. 1 RR 34-35, 42-44. Petitioners' business is lucrative. They net up to $1200 profit per sale, with international first/business class travel (American's most sought after customers) comprising 99.9% of the award tickets they sell. 1 RR 35, 38.

In order to obtain tickets for its clients, FFD routinely defrauds American's reservation agents by obtaining award-related services, without divulging that the tickets will be or have been sold. 1 RR 49, 85; 2 CR 308-309, 337. FFD employees "pick up the phone and call American about a particular route." 2 CR 337. They represent that they are calling about AAdvantage awards on particular routes, but do not reveal that the award tickets will be sold. 1 RR 85; 2 CR 337. FFD customer-service representatives call American about AAdvantage tickets that FFD already has sold, but again do not disclose that fact. 1 RR 49; 2 CR 308-309. Petitioners freely admit that they convince their customers to lie to American and say that the award tickets they bought were "gifts" in order to conceal their conduct from American. 1 RR

51 ("Q. You instruct your customers to tell American that the AAdvantage award ticket they purchased was a gift? A. Yes. Q. And that's a lie because actually it wasn't a gift, it was purchased? A. That's correct."); 1 RR 87.

Petitioners, however, are not alone in this scheme to illegitimately and improperly acquire American's tickets. Thus, American filed this lawsuit against petitioner and other companies and individuals, involved in similar illicit activities, to stop the wrongful purchase, sale, and barter of AAdvantage miles and award tickets. 1 CR 41-72. American asserted claims for interference, fraud, and misappropriation as to all petitioners and breach of contract as to Robert Pirkle, who is an AAdvantage member. 1 CR 50-53, 62-68. American asserted similar claims against Main St. Travel Center of Monsey, Inc. and two of its agents and Luxury Tour Source, Ltd. and its president. 1 CR 41-72.[2]

Petitioners responded by moving to dismiss all of the claims against them, except for the breach-of-contract claims, on the grounds that the claims were preempted by 49 U.S.C. §41713. 1 CR 79-86. A few weeks later Main St. filed a similar motion. 1 CR 180-194.

Petitioners then filed a counterclaim against American. 1 CR 155-173. Petitioners asserted that American tortiously interfered with their business relationships and violated the Texas antitrust statute

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[2] American brought a separate breach-of-contract claim against Main St. because Main St. had agreed in a contract with American not to issue frequent-flyer award tickets that had been purchased, bartered, or sold in violation of the No Sale Rule. Pet. App. 48a.

and Texas Deceptive Trade Practices Act. Petitioners based their claims on American's acts to enforce its rights under its contracts with its customers to prevent them from selling their frequent flyer miles to petitioners. 1 CR 164-169. American filed an answer to the counterclaim and asserted, *inter alia*, that petitioners' claims were preempted by 49 U.S.C. §41713(b)(1). 1 CR 176-178.

On September 16, 2008, the district court heard American's request to enter a temporary injunction prohibiting petitioners from buying, selling, bartering, or soliciting AAdvantage rewards during pendency of the suit. 2 CR 280-370. Petitioners did not dispute their fraudulent acts but argued that various affirmative defenses prevented issuance of the temporary injunction. 2 CR 371-384. The district court rejected petitioners' arguments and granted American's application. 2 CR 422-424. American did not seek a temporary injunction against Main St.

Petitioners filed an accelerated interlocutory appeal from the temporary-injunction order. 2 CR 425; see Tex. Civ. Prac. & Rem. Code §51.014(a)(4) (authorizing interlocutory appeals from an order granting a temporary injunction); Tex. Rule App. Proc. 28.1(a) (providing that appeals from interlocutory orders will be accelerated). Main St. filed no appeal and had no right to, as it had not been targeted for a temporary injunction.[3]

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[3] Main St. is not a proper respondent in this proceeding, and was not entitled to respond to the petition, because it is not a party to the judgment entered by the court of appeals. Sup. Ct. Rule 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court . . . ."). Main St. was not subject to the temporary injunction entered by the district court that

The court of appeals affirmed the district court's order granting the temporary injunction. *Frequent Flyer Depot, Inc.* v. *American Airlines, Inc.*, 281 S.W.3d 215 (Tex. App.—Fort Worth 2009, pet. denied). The court of appeals held that American's claims are not preempted by 49 U.S.C. §41713(b)(1) because the statute preempts only those state actions having a regulatory effect on airlines. Pet. App. 6a-9a. Section 41713(b)(1) provides that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." The court of appeals explained that American's claims were not preempted because "although American has brought mostly tort claims, those claims attempt to protect the vitality of its self-imposed obligations: those arising from the AAdvantage® program." Pet. App. 8a. The court further explained that

> "American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts." *Ibid.*

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was reviewed via interlocutory appeal. Main St. was neither an appellant nor an appellee in the court of appeals and filed no brief in the court of appeals. Therefore, Main St.'s filing of a brief in support of the petition is improper.

The court concluded that "denying American access to state courts for such purpose would seem to have such an impermissible regulatory effect." *Id.*, at 8a-9a. The court of appeals also rejected petitioners' other challenges to the temporary injunction on substantive and procedural grounds under Texas law and held that the district court did not abuse its discretion in entering the temporary injunction. *Id.*, at 9a-25a.

Petitioners then sought discretionary review from the Texas Supreme Court. On August 21, 2009, the Texas Supreme Court denied petitioners' petition for review. The court denied petitioners' motion for rehearing on October 9, 2009.

While petitioners have pursued interlocutory review of the temporary injunction, the case has proceeded forward in the district court. Tex. Civ. Prac. & Rem. Code §51.014(b) (providing that an interlocutory appeal of a temporary injunction does not stay further proceedings or trial pending appeal). Among the various proceedings that have occurred, American has amended its petition to assert additional tort claims against petitioners and the other defendants that were not at issue in the temporary-injunction proceeding. For example, American's Seventh Amended Petition asserts a tort claim against petitioners for knowingly accessing American's computer systems without consent in violation of Texas Penal Code §33.02 and Texas Civil Practice & Remedies Code §143.001. *American Airlines, Inc.* v. *Frequent Flyer Depot, Inc., et al.*, Case No. 067-224132-07, Seventh Amended Petition filed on Dec. 31, 2009, at 32-33.

After petitioners filed their petition with this Court, both they and Main St. filed motions to sever

the ongoing case in the trial court. The district court denied these motions on January 11, 2010. If the district court had granted the motions to sever, the case from which this proceeding arises would have been split into two separate and independent cases. Tex. Rule Civ. Proc. 41; *Kan. Univ. Endowment Assn.* v. *King*, 162 Tex. 599, 611-612, 350 S.W.2d 11, 19 (1961). On February 18, 2010, the district court entered an order setting this case for trial on August 16, 2010. *American Airlines, Inc.* v. *Frequent Flyer Depot, Inc., et al.*, Case No. 067-224132-07, Order Resetting Case for Final Trial.

REASONS FOR DENYING THE PETITION

I. THE COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS INTERLOCUTORY STATE-COURT JUDGMENT.

The Court does not have jurisdiction to review the state court of appeals's nonfinal interlocutory judgment against petitioners. 28 U.S.C. §1257(a). The Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." *Ibid.*; see *Johnson* v. *California*, 541 U.S. 428, 430 (2004) (*per curiam*); *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 77 (1997). The Court has characterized §1257(a) as "a firm final judgment rule" that limits the Court's jurisdiction to review the judgments of state courts. *Jefferson*, 522 U.S., at 81. "[T]he finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Ibid.* (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).

Thus, "[t]o be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market Street Ry. Co.* v. *R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). It is indisputable that the court of appeals's judgment is not an effective termination of the litigation. None of the claims brought by American or counterclaims brought by petitioners has been adjudicated on the merits either by summary judgment or at trial. And the underlying case in the state court has proceeded while the appeal of the temporary injunction has been ongoing. Because the court of appeals's decision has not "effectively determined the entire litigation," it is not final under §1257. *Id.*, at 84.

Nor does this case fall within any of the "exceptional categories of cases" that might be regarded as final under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The federal preemption issues presented in the underlying case have never been finally resolved on the merits. The state court determination of entitlement to a temporary injunction pending a resolution of the ultimate merits of the case does not itself constitute any kind of final merits resolution that could remotely bring the case within any imaginable definition of "final." Indeed, if petitioners were to prevail at trial and defeat American's claims on state-law grounds, then petitioners' preemption defense would never need to be decided by the state courts. See *Jefferson*, 522 U.S., at 82 (holding that interlocutory state-court judgment was not final because "[r]esolution of the

state-law claims could effectively moot the federal-law question raised here"). And if the state courts do eventually resolve petitioners' preemption defense on the merits, they can seek appellate review at that time. See *Johnson*, 541 U.S., at 430-431; *Jefferson*, 522 U.S., at 82-83. Additionally, reviewing the court of appeals's decisions now would not resolve the entire case because the temporary injunction was based on only some of the tort claims asserted against petitioners, and did not address American's other claims against petitioners and their codefendants or petitioners' counterclaims against American. See *Flynt* v. *Ohio*, 451 U.S. 619, 621 (1981) (*per curiam*) ("[I]n most, if not all, of the cases falling within the four exceptions, not only was there a final judgment on the federal issue for purposes of state-court proceedings, but also there were no other federal issues to be resolved. There was thus no probability of piecemeal review with respect to federal issues.").

The Court need read no further. Petitioners acknowledge that they seek review of a nonfinal, temporary injunction from state court. Proceedings in the case are continuing, and the matter will likely be tried to a conclusion on the merits before the Court returns to the bench for its October 2010 term. The Court's jurisdictional statute sensibly prohibits premature review of petitioners' preemption defense before the state courts have been permitted even to make a considered, final determination on the matter. See *Costarelli* v. *Massachusetts*, 421 U.S. 193, 196 (1975) (*per curiam*) ("an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when

the underlying dispute may be otherwise resolved"). The petition should be denied.

II. THE COURT OF APPEALS'S INTERLOCUTORY DECISION IS CORRECT AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Even if the Court had jurisdiction, review is not warranted because the court of appeals's interlocutory judgment is correct and there is no conflict among the lower courts. The court of appeals correctly determined—consistent with every other court to address this issue—that §41713(b)(1) does not preempt American's claims against petitioners because American seeks only to enforce its own legitimate contracts, and the claims do not have any regulatory effect on airlines. Pet. App. 8a-9a; see also *Alaska Airlines, Inc.* v. *Carey*, 2009 WL 777391, *1-*2 (WD Wash. Mar. 19, 2009) (holding that §41713(b)(1) did not preempt airline's tort claims against person who brokered frequent-flyer tickets in violation of airline's requirements that award tickets could not be sold or purchased); *Cont'l Airlines, Inc.* v. *Weiner*, 1999 U.S. Dist. LEXIS 16377, *15-*18 (CD Cal. 1999) (same).

A. The Court of Appeals Correctly Determined That American's Tort Claims Against Petitioners Are Not Preempted.

When Congress enacted the Airline Deregulation Act to deregulate the airline industry, it determined that "maximum reliance on competitive market forces" would further "efficiency, innovation, and lower prices." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Thus, the Court has explained that it is "the ADA's purpose to leave largely *to the airlines themselves*, and not at all to

States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995) (emphasis added). To "ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S., at 378, Congress provided that states "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1).

In *Wolens*, the Court held that claims under a state-law consumer protection statute were preempted because it "serve[d] as a means to guide and police the marketing practices of the airlines." 513 U.S., at 228. Thus, *Wolens* clarifies that claims are preempted only if they would result in regulating how airlines, like American, do business. 513 U.S., at 228-229. This is consistent with the Court's statement in *Morales* that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." 504 U.S., at 390.

Wolens explained that "the phrase 'having the force and effect of law' is most naturally read to 'refe[r] to binding standards of conduct that operate irrespective of any private agreement.'" 513 U.S., at 229, n.5 (quoting Brief for United States as Amicus Curiae 16). *Wolens* further explained that "the ban on enacting or enforcing any law 'relating to rates, routes, or services' is most sensibly read, in light of the ADA's overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on

the operations of an air carrier.'" *Ibid.* (quoting Brief for United States as Amicus Curiae 16).

Consistent with the text of §41713(b)(1), *Morales*, and *Wolens*, the court of appeals determined that American's tort claims that were the basis for the temporary injunction were not preempted. Pet. App. 9a. The court explained that the ADA "was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards" and concluded that "denying American access to state courts for such purposes would seem to have such an impermissible regulatory effect." Pet. App. 8a-9a. The court further explained that American's claims against petitioners "attempt to protect the vitality of [American's] self-imposed obligations." Pet. App. 8a.[4] In other words, American's attempts to enforce its legitimate contracts do not "hav[e] the force and effect of law" because they do not impose regulatory "standards of conduct." *Wolens*, 513 U.S., at 229, n.5.

Petitioners' complaint that "[t]he Texas courts eliminated Frequent Flyer's competition with American," Pet. 11, merely underscores why American's claims are not preempted. Petitioners admit that their business is helping people obtain tickets from American under false pretenses. They

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[4] In the lower courts, petitioners challenged the validity and enforceability of the contract between American and the AAdvantage members that govern American's frequent-flyer program. Although the court of appeals held that the contracts between American and its customers are valid under Texas law, Pet. App. 12a-16a, petitioners impermissibly continue to dispute the court of appeals's state-law decision. See Pet. 7-8.

do not compete with American—they help others take seats on American's flights without paying American for them. Petitioners' so-called competition is nothing more than an attempt to argue that American cannot restrict who it sells tickets to even though it is long settled that airlines and common carriers have the right to control the distribution of tickets for their flights. See *Bitterman* v. *Louisville & Nashville R.R.*, 207 U.S. 205, 221 (1907); *Cont'l Airlines, Inc.* v. *Intra Brokers, Inc.*, 24 F.3d 1099, 1103-1104 (CA9 1994); *American Airlines, Inc.* v. *Christensen*, 967 F.2d 410, 418 (CA10 1992).

Under petitioners' view of the law, they could print counterfeit tickets and use them to fly for free on American's planes, because American would be powerless to enforce its own ticketing policies and contracts in court. While the preemptive effect of §41713(b) is quite broad, nothing in the text or history of §41713(b) or this Court's prior decisions prevents airlines, like American, from using the courts to enforce legitimate contractual restrictions on who flies on its planes, subject to relevant federal statutes and regulations. Taken seriously, Petitioners' argument would lead to the conclusion that American and other airlines cannot control who they transport on their planes and cannot defend themselves against common fraudsters.

B. The Court of Appeals's Decision Does Not Conflict with the Decision of Any Other Court.

Every court to review airlines' claims seeking to stop frequent-flyer fraud has held that that the claims are not preempted. Pet. App. 8a-9a; see also *Carey*, 2009 WL 777391, *1-*2; *Weiner*, 1999 U.S.

Dist. LEXIS 16377, *15-*18.[5] Petitioners' suggestion that the court of appeals's decision is somehow inconsistent with the decisions of other courts erroneously presupposes that the court of appeals wrongly held that whether tort claims are preempted depends on the identity of the person asserting the claim rather than the substance of the claim. See Pet. 9-10, 12-15; Main St. Br. 11. But the court of appeals never suggested that whether §41713(b)(1) preempts a state-law claim is based on the identity of the person asserting the claim. Pet. App. 7a-9a. Rather, the court of appeals held, consistent with *Wolens*, that §41713(b)(1) preempts claims that attempt to impose state regulatory standards on airlines but that §41713(b)(1) does not preempt claims brought to enforce an airline's own self-imposed rules, rights, and obligations. Pet. App. 8a-9a.

In the cases cited by petitioners, the courts held that §41713(b)(1) preempted claims because they would have had a regulatory effect on the prices, routes, or services of an airline, not because of the identity of the defendant. See *Huntleigh Corp.* v. *La. State Board of Private Sec. Examiners*, 906 F.Supp. 357, 362 (ED La. 1995) (holding that §41713(b)

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[5] Contrary to what Main St. suggests, these cases are not in tension with the Seventh Circuit's decision in *Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 889 F.2d 751 (1989), which was decided before *Morales* and *Wolens*. In any event, *Illinois Corporate Travel* held that claims against an airline challenging its marketing and advertising practices under the Illinois Consumer Fraud and Deceptive Trade Practices Act were preempted under the ADA. 889 F.2d, at 754-755. This is precisely the same result reached in *Wolens*, which also involved claims against an airline under the same Illinois statute. See 513 U.S., at 227-228.

preempted state law attempting to regulate licensing of an agent for an airline that provided security screening services); *Marlow* v. *AMR Servs. Corp.*, 870 F.Supp. 295, 299 (D. Haw. 1994) (holding that §41713(b) preempted claims against company that provided jetbridge services to an airline); *Lyn-Lea Travel Corp.* v. *American Airlines, Inc.*, 283 F.3d 282, 287 (CA5) (holding that tortious-interference claims brought by ticket agent against a company that provided reservation services for an airline based on airline's decision to lower ticket prices were preempted), cert. denied, 537 U.S. 1044 (2002); *Fed. Express Corp.* v. *Cal. Pub. Utils. Comm'n*, 936 F.2d 1075, 1078-1079 (CA9 1991) (holding that §41713(b) preempted claims against a cargo air carrier's trucking operations); *Cont'l Airlines, Inc.* v. *American Airlines, Inc.*, 824 F.Supp. 689, 697 (SD Tex. 1993) (holding that preemption under §41713(b) could not be avoided by suing an airline's parent corporation).[6] In other words, the state-law claims in these cases were preempted because of the regulatory effect the claims would have had on the airlines, even though the claims were brought against agents of or companies affiliated with the airlines. But no case has held that a stranger to an air carrier is somehow entitled to the protections of §41713(b)(1) when the asserted claims will not have an improper regulatory

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[6] Similarly, *ABC Charters, Inc.* v. *Bronson*, 591 F.Supp.2d 1272 (SD Fla. 2008), held that §41713(b) preempted Florida state laws that attempted to regulate federally licensed companies that provided charter flights to Cuba and agents that arranged for the charter flights to Cuba. *Id.*, at 1299-1300. The court held that the state law was preempted because the state law would have affected the ability of the charter flight providers to provide air service to Cuba. *Ibid.*

effect on an air carrier that provides air transportation.

Similarly, petitioners' misplaced suggestion that the court of appeals's decision is somehow inconsistent with the decisions of other courts that have held tort claims are preempted, see Pet. 14-15; Main St. Br. 10-11, ignores the fact that no court has ever held that all tort claims are categorically preempted. The various cases cited by petitioners to suggest the existence of a conflict are readily distinguishable as they all directly challenged how airlines or their affiliates provided services. See *United Airlines, Inc.* v. *Mesa Airlines, Inc.*, 219 F.3d 605, 608-609 (CA7) (holding that state-law claims brought by a regional airline against a national airline for its decision to change what regional airline it would codeshare with were preempted), cert. denied, 531 U.S. 1036 (2000); *Lyn-Lea Travel Corp.*, 283 F.3d, at 287 (holding that tortious-interference claims brought by ticket agent against a company that provided reservation services for an airline based on airline's decision to lower ticket prices were preempted); *Cont'l Airlines, Inc.* v. *United Airlines, Inc.*, 120 F.Supp.2d 556, 572-574 (ED Va. 2000) (holding that claims challenging policies regarding carry-on luggage were preempted); *Buck* v. *American Airlines, Inc.*, 476 F.3d 29, 36 (CA1 2007) (holding that state-law claims seeking refunds of fees paid to airline were preempted); *Travel All Over the World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F.3d 1423, 1434-1435 (CA7 1996) (holding that state-law intentional tort claims based on airline's refusal to transport passengers were preempted); *Ex parte Delta Air Lines, Inc.*, 785 So.2d 327, 334 (Ala. 2000) (holding that tort claims for damaging luggage were preempted); *Casas* v. *American Airlines, Inc.*, 304

F.3d 517, 525-526 (CA5 2002) (holding that state law claims for lost luggage were preempted); *Statland* v. *American Airlines, Inc.*, 998 F.2d 539, 541-542 (CA7 1993) (holding that claims seeking refund of fees paid to airline were preempted). These cases are inapposite because American merely seeks to enforce its own contractual and related rights, and none involves a context remotely similar to this case.

Petitioners attempt to paint a conflict by improperly lumping together the entire body of case law dealing with §41713(b) and broadly asserting differences among opinions. But petitioners make no effort whatsoever to acknowledge the specific context within which this case arises. It is one thing to say that statutory or tort claims against an airline are preempted because they create an impermissible state regulatory effect on the airline's rates, routes, and services. But it is another thing altogether to assert that §41713(b)(1) prevents an airline from using a state's judicial processes to enforce its contractual rights. Permitting enforcement of contract rights has no impermissible regulatory effect on the airline or market competition and, understandably, petitioners cannot point to a single decision conflicting with the court of appeals's opinion in this case.

Petitioners decline to recognize this contextual distinction because it shows the absence of any split of authority touching the issues actually presented by this case. That they are forced into making the broadest of generalizations only reinforces the ineluctable conclusion that the petition has nothing to add to the already burgeoning body of §41713(b) precedent.

So, while some have pointed to an alleged conflict with respect to the meaning of "services" under §41713(b), see *Nw. Airlines, Inc.* v. *Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., joined by Rehnquist, C.J., and Thomas, J., dissenting from denial of certiorari),[7] that question is entirely irrelevant in this case. As the Second Circuit has acknowledged, the purported difference between the definitions of services primarily relates to whether §41713(b)(1) preempts claims related to luggage handling, boarding procedures, and providing food and drink on flights. *Air Transport Assn. of America, Inc.* v. *Cuomo*, 520 F.3d 218, 223 (CA2 2008). This case, which addresses petitioners' activities involving the misappropriation of American's tickets simply does not implicate the issue on which the circuits are purportedly divided.

C. Petitioners' Alternative Arguments Do Not Merit This Court's Attention.

Petitioners also raise, as an alternative question, that "[i]f preemption is limited by the identity of the alleged wrongdoer, what criteria are to be used in making the determination of whether a state law claim against a particular person is preempted." Pet. i.[8] Petitioners' alternative question, however,

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[7] The Court has subsequently denied other petitions that purport to present the same split. See, *e.g.*, *Lyn-Lea Travel Corp.* v. *American Airlines, Inc.*, 537 U.S. 1044 (2002) (order denying petition); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248 (CA11 2003) (holding that state-law whistleblower claims were not preempted by ADA), cert. denied, 540 U.S. 1182 (2004).

[8] Petitioners also suggest in passing that 49 U.S.C. §41712, which gives the Department of Transportation the discretion to investigate alleged acts of deceptive practices or unfair methods of competition, may also apply in this case. Pet. 17. Similarly,

underscores its fundamental misunderstanding of the court of appeals's decision. As previously explained, the court of appeals never held that preemption is limited based on the identity of a litigant. Rather, it addressed whether American's claims "hav[e] the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1).

In any event, petitioners' suggestion that if the identity of the litigant is relevant, then the Court should determine whether they are "air carrier[s]" or "ticket agent[s]" is entirely misplaced. Pet. 5. The plain text of §41713(b)(1) states that state law is preempted only to the extent it is "related to a price, route, or service of an air carrier *that may provide air transportation under this subpart*." 49 U.S.C. §41713(b)(1) (emphasis added). Thus, whether petitioners are air carriers or ticket agents (in fact, they are neither) is irrelevant. The relevant inquiry is whether the claims are related to the services of an

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Main St. argues that in addition to the express preemption argument raised by petitioners, that American's claims are also preempted by the "comprehensive administrative remedies promulgated by Congress" in §41712. Main St. Br. 17. Any argument that §41712 applies in this case is not properly before the Court. The question presented is limited to the preemptive effect of §41713. Pet. i. Additionally, petitioners never raised this argument in the district court. It was raised for the first time in the court of appeals, but the court of appeals declined to address the issue. In any event, §41712 does not apply in this case in any way that affects American's claims. Main St. also argues in passing that American's claims are conflict preempted. Main St. Br. 17-18. This argument has not been raised below, but in any event, Main St. is simply incorrect.

air carrier "that may provide air transportation." *Ibid.*

Finally, petitioners' suggestion that the court of appeals's application of §41713(b) in this case is somehow contrary to principles of equal protection, Pet. 18-19, is wholly misplaced. First, this issue is not properly before the Court because petitioners never raised any equal-protection argument in the courts below. In any event, it is well settled that the equal-protection clause prohibits Congress from treating different persons differently with respect to economic regulation only if it had no rational basis to do so. The Court has recognized that Congress's intent in enacting the ADA was to protect airlines from state regulation. Thus, it is unsurprising that the protections of §41713(b) would not apply to American's claims against petitioners.[9]

III. This Interlocutory Appeal Is a Poor Vehicle for Addressing the Questions Presented.

Finally, this case is a particularly poor vehicle for addressing the preemptive effect of §41713(b). Because this case involves the interlocutory appeal of a state-court order granting a temporary injunction, this case will likely be tried on the merits in state district court before this Court could even hear this

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[9] Petitioners' suggestion that American lacks standing to claim alleged wrongs committed against its customers, Pet. 17, n.7, is wholly irrelevant. All of American's claims against petitioners are based on injuries suffered by American due to petitioners' violation of American's legal rights and interests. See Pet. App. 42a-49a. Moreover, because American's claims are grounded in Texas law and are asserted in Texas state court, Texas law determines whether American can complain of the conduct at issue.

case. Indeed, the district court has set the case for trial on the merits in August, before the Court even returns for the start of its October 2010 Term. And when the case is tried, it is possible that the preemption issues raised in this case will be rendered moot depending on the resolution of the state-law issues and whatever disputed factual issues, if any, remain in the case.

With no stay in place and the district-court litigation moving forward toward a resolution on the merits in the near future, there is no rationale to justify the Court's commitment of resources to a petition on an interlocutory order that will almost certainly be mooted in the coming months by a final decision on the merits from which petitioners, if they so choose, may seek and obtain appellate review of the entire case, not merely the sliver that was made the subject of the temporary injunction and the interlocutory appeal. In an appeal after final judgment, the appellate courts will have an opportunity to review the scope of preemption under §41713(b) as it applies to all of the claims in this case, not just the few claims that were at issue with respect to the temporary injunction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

FREQUENT FLYER DEPOT, INC., GEORGE PIRKLE AND ROBERT PIRKLE,

Petitioners,

vs.

AMERICAN AIRLINES, INC.

Respondent.

On Petition for a Writ Of Certiorari
to the Court of Appeals, Second District of Texas

REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AMERICAN AIRLINES

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Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle ("Frequent Flyer Depot") reply to American Airlines' ("American") Brief in Opposition.

REPLY TO JURISDICTION

American contests this Court's jurisdiction. The issue presented to the Court relates to federal preemption of state law by 49 U.S.C. §41713(b)(1) in the context of a temporary injunction issued by a state court.

As American noted, this Court has created several exceptions to the requirement of a final judgment for an appeal. There are a growing number of cases in which the federal issue has been decided regardless of continuing state law issues. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-8 (1975).

One type of case enumerated in *Cohn* where jurisdiction is exercised regardless of continuing state law issues is

> [W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state

> proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy...

Id. at 482-3. Clear federal policy has been expressed in 49 U.S.C. § 41713(b)(1).

In *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 418 (1971) the Court reviewed a state court temporary injunction. Chief Justice Brennan wrote:

> The injunction is termed a "temporary" injunction by the Illinois courts. We have therefore considered whether we may properly decide this case. 28 U. S. C. § 1257. We see nothing in the record that would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on petitioners' First Amendment rights. Although the record in this case is not such as to leave the matter entirely free from doubt we conclude we are not without power to decide is case.

The differences in this case are that the subject temporary injunction has been only been in place for 17 months and the marked impact is upon Frequent Flyer Depot's financial health.

The exercise of this Court's jurisdiction is appropriate where, as here, the issue presented involves the asserted preemption of law that would, regardless of any further factual development or proceedings, be outcome determinative. *Local No. 438 Constr. & General Laborers' Union, AFL-CIO, v Curry,* 371 U.S. 542, 549 (1963) The Court held in *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 fn. 5 (1983):

> The judgment of the Kentucky Court of Appeals is final within the meaning of 28 U.S.C. § 1257: it finally disposed of the federal pre-emption issue; a reversal here would terminate the state-court action; and to permit the proceedings to go forward in the state court without resolving the pre-emption issue would involve a serious risk of eroding the federal statutory policy of "'requiring the subject matter of respondents' cause to be heard by the . . . Board, not by the state courts.'" Or as JUSTICE REHNQUIST put it, our jurisdiction in *Curry* rested on the "understandable principle that where the proper forum for trying the issue joined in the state courts depends on the resolution of the federal question raised on appeal, sound judicial administration requires that such a question be decided by this Court, if it is to be decided at all, sooner rather than later in the course of the litigation"

(Citations omitted).

This Court should exercise its jurisdiction and grant the Petition for Writ of Certiorari.

REPLY TO FACTS

The issue presented to this Court is whether American's tort claims are preempted by 49 U.S.C. § 41713(b)(1). The facts necessary to resolve this issue are undisputed and are identical to those that would be presented after a trial.[1]

American describes Frequent Flyer Depot in inflammatory terms[2] and focuses on matters irrelevant to preemption. American presents the Airline Deregulation Act as an airline protection act. Opposition, page 23. American predicts dire consequences if Frequent Flyer Depot is correct, including subjecting a defenseless American to crimes such as counterfeiting tickets. Opposition, page 16. Frequent Flyer Depot committed no crimes. American equates breaches of its AAdvantage terms and conditions with crimes. These are non-issues.

The issues presented involve the application of 49 U.S.C. § 41713(b)(1) to American's claims arise

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[1] There are fact issues, but the core facts that American seeks to prevent the sale and barter of frequent flyer miles and Frequent Flyer Depot brokers the sale and purchase of frequent flyer miles will not change.

[2] The plaintiffs in *Am. Airlines v. Wolens* probably had unkind things to say about American for changing its AAdvantage terms retroactively, but, there, as here, those unkind words are irrelevant.

from Frequent Flyer Depot's business of brokering the purchase of American's frequent flyer miles used to fly on American.

49 U.S.C. § 41713(b)(1) is part of the Airline Deregulation Act, which places "maximum reliance on competitive market forces" to further "efficiency, innovation, and lower prices," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992), To avoid the application of 49 U.S.C. § 41713(b)(1), American argues that Frequent Flyer Depot does not compete with American. American also complains that Frequent Flyer Depot uses American's frequent flyer program to purchase tickets to fly on American at prices lower than those offered by American.[3] Opposition, page 5. This is competition. The temporary injunction prevents this competition.

THE TEXAS COURT OF APPEALS ERRED

American states that Frequent Flyer Depot argues that the identity of the person against whom the claim is made is the sole consideration of a claim for preemption under 49 U.S.C. § 41713(b)(1). This not Frequent Flyer Depot's position. Frequent Flyer Depot argues where a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier" that law is preempted. Frequent Flyer Depot's focus is dictated by the ruling of the Texas Court of Appeals.

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[3] American created this peculiar situation. According to American, a consumer using Frequent Flyer Depot's services can purchase American frequent flyer miles, pay Frequent Flyer Depot a fee of $1,200 and still purchase tickets at a price "much less" than the price charged by American. Opposition, page 5.

Absent factors relied upon by the Texas Court of Appeals, there is no question that American's claims are preempted. American relies on common law to find and enforce the duties it alleges Frequent Flyer Depot has breached. If 49 U.S.C. § 41713(b)(1) applies, the common law is preempted. *Smith v. Comair Inc.*, 134 F.3d 254, 257-8 (4th Cir. 1998); *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1435 (7th Cir. 1998); *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 754 (7th Cir. 1989); *Continental Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 571, fn 30 (E.D. Va. 2000) The *Smith* court held that "when a contract claim cannot be adjudicated without resort to outside sources of law, the claim is still preempted by the ADA." 134 F.3d at 257. This Court held that state laws applicable to frequent flyer miles relate to an airline's prices, routes and services and are preempted. *Am. Airlines v. Wolens*, 513 U.S. 219 (1995). If comparable Texas common law tort claims were made against American with regard to its frequent flyer miles, those claims would be preempted. *Id.*

Thus, there must be another factor that precludes the preemption of American's claims against Frequent Flyer Depot. Frequent Flyer Depot expresses the issue by asking whether the preemption only applies to certificated air carriers, the preemption issue has only arisen in this Court in the context of certificated air carriers. American focuses upon the impact of the state law and its regulatory effect. In either event, the issue relates to how the 49 U.S.C. § 41713(b)(1) preemption should apply to persons other than air carriers.

In cases cited by Frequent Flyer Depot, the lower courts considered complained of activities in the context of air transportation, found the effect precluded by 49 U.S.C. § 41713(b)(1) and preempted the claims without regard to the identity of the person against whom the claim was made. *See Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), *cert. denied* 537 U.S. 1044 (2002) (computer reservation system); *Fed. Express Corp. v. Cal. Pub Util. Comm'n.*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied* 504 U.S. 979 (1992) (trucking operations of an air carrier); *Huntleigh Corp. v. La. State Bd. of Private Sec. Examiners*, 906 F. Supp. 357 (M.D. La. 1995) (company providing passenger pre-departure clearance); *Marlow v. AMR Serv. Corp.*, 870 F. Supp. 295 (Haw. 1994) (jetbridge operator); *Cont'l Airlines, Inc. v. Am. Airlines*, 824 F. Supp. 689 (S.D. Tex. 1993) (airlines' parent).

The Texas Court of Appeals found something more to lead it to conclude the 49 U.S.C. § 41713(b)(1) preemption does not apply to American's claims against Frequent Flyer Depot. No agreement precludes Frequent Flyer Depot from acting as it does. American claims to have contracts with members of its AAdvantage frequent flyer program. American seeks to force Frequent Flyer Depot to abide by the terms of those purported agreements through state law tort claims.

Texas Court of Appeals concluded that American's claims are not preempted because its claims have no impermissible regulatory effect on American. According to the Texas Court of Appeals, the restrictions have no impermissible impact

because the restrictions are contained in an agreement which contains American's "self-imposed obligations." The Texas Court of Appeals held:

> American's invoking the benefits and protections of state law to protect its own agreements does not have the same impermissible regulatory effect upon prices, routes, or services that Congress was concerned with in enacting section 41713(b)(1). The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts.

Frequent Flyer Depot v Am. Airlines, Inc., 281 S.W.3d 215, 221 (Tex. App.—Fort Worth 2009, pet. denied), *pet. for writ of cert. pending.*

The Texas Court of Appeals' analysis contains a syllogistic fallacy: (a) clauses in the agreement restricting American can be enforced, (b) clauses in the agreement restrict persons other than American, therefore, (c) clauses in the agreement can be enforced against persons other than American. The Texas Court of Appeals' analysis is remarkably similar to the rejected logic of the Illinois Supreme Court in *Wolens v. Am. Airlines, Inc.,* 157 Ill. 2d 466; 626 N.E.2d 205, 208 (1993), *rev'd Am. Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995).

The Texas Court of Appeals' analysis conflicts with the analysis in *Cont'l Airlines, Inc. v. United Airlines, Inc.,* 120 F. Supp. 2d 556 (E.D. Va. 2000),

where the court concluded 49 U.S.C. § 41713(b)(1) preempted tortious interference claims made by one airline against another airline. *Id.* at 571-572. The District Court did not consider the fact that the airline was seeking to "protect the vitality of its self-imposed obligations" in its analysis. The court's analysis was whether the airline's state law claim related to the prices, services or routes of an air carrier. *Id.*

The Texas Court of Appeals' analysis should have stopped with this Court's holding in *Am. Airlines v. Wolens* and a finding of preemption, but the Texas Court of Appeals went further.

Effectively, the Texas Court of Appeals held that since American seeks to enforce restrictions which are part of an agreement that also contains "self-imposed obligations," the imposition through tort law of the restrictions on strangers to the contract have no regulatory effect. Beyond being a logical fallacy, the holding conflicts with cases where tort claims founded on a contractual relationship made by an airline against another airline are preempted. *See United Airlines, Inc. v. Mesa Airlines, Inc.,* 219 F.3d 605 (7th Cir.) *cert. denied,* 531 U.S. 1036 (2000).

To conclude, the arguments advanced by Frequent Flyer Depot, Inc., George Pirkle and Robert Pirkle and American Airlines in this Court and in the lower courts demonstrate the need for additional working out of the scope of 49 U.S.C. § 41713(b)(1). *Am. Airlines v. Wolens,* 513 U.S. at 234-5. The Petition for Writ of Certiorari provides the proper setting for this "working out."

Respectfully submitted,

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